No. 541.

In the Supreme Court of the United States.

October Term, 1919.

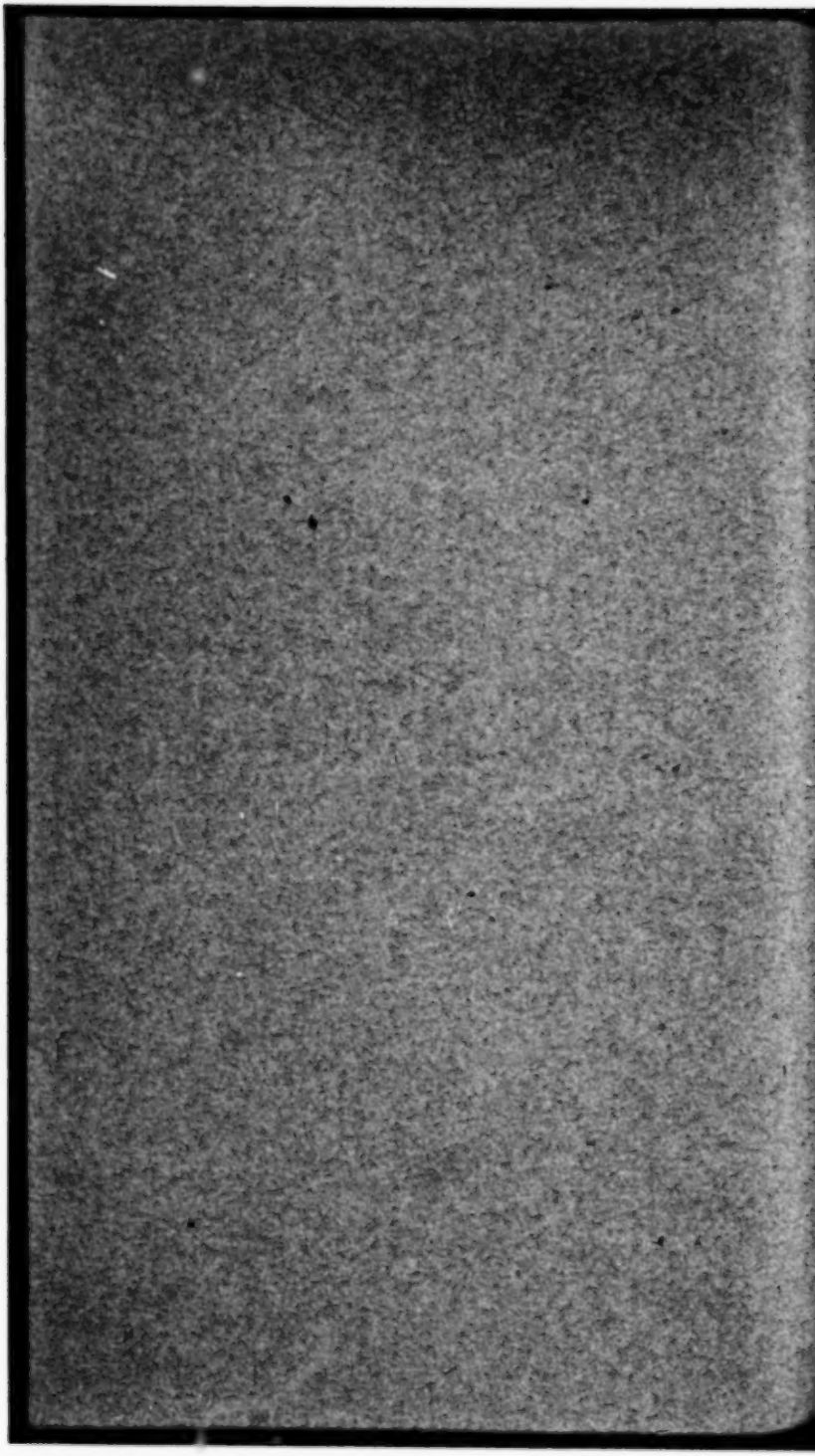
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS.



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STATEMENT OF THE CASE.

This is a suit in equity brought by the appellees (hereafter called plaintiffs) to enjoin, set aside, and annul an order of the Interstate Commerce Commission, dated April 14, 1919, requiring plaintiffs to use two modified forms of bills of lading, one for domestic and the other for export transportation of merchandise.

ALLEGATIONS OF THE PETITION.

The petition alleges, in substance, that plaintiffs are common carriers by railroad and common carriers by inland waterway and sea. The rail carriers are the

owners of railroads, engaged in interstate commerce, now under Federal control. The water carriers are engaged in water transportation under a common control, management, or arrangement for a continuous carriage or shipment in connection with rail lines. Certain of said water lines are also under Federal control. (Rec. 2.)

On May 6, 1912, the Interstate Commerce Commission instituted, under its docket No. 4844, a proceeding entitled *In the Matter of Bills of Lading.*

Notice of the proceeding having been served on plaintiffs and other common carriers subject to the act to regulate commerce, the Commission on sundry dates took testimony, received briefs, and heard arguments. On April 14, 1919, the Commission issued its report in said proceeding, which was also duly served on plaintiffs, and other common carriers, subject to said act and the Director General of Railroads. (Rec. 2-4.)

By its report the Commission found that the common carriers parties to the proceeding have been, and are maintaining and enforcing rules and regulations contained in their present bills of lading, and are engaging in practices thereunder, which are unjust, unreasonable, or otherwise in violation of law. The Commission, therefore, ordered and directed that said common carriers, and the Director General of Railroads, on or before August 8, 1919, cease and desist from using their present bills of lading to the extent that the provisions and regulations contained therein

are inconsistent with or different from those contained in the forms of bills of lading annexed to the report marked Appendixes B and D, which two forms the Commission found would be just, reasonable, and lawful bills of lading. (Id.)

Plaintiffs deny that they have been or are maintaining and enforcing rules and regulations contained in their bills of lading or are engaging in practices thereunder, which are unjust, unreasonable, or otherwise is violation of law; and they aver that the Commission is not authorized by the act to regulate commerce or any other law to make the order in question; that neither said act nor any other law imposes on them the obligation to issue bills of lading in the form prescribed; that the provisions which are directed to be stricken out are not in conflict with any rules of law, and that the Commission acted without supporting evidence. (Rec. 4-5.)

The following are alleged to be instances of action by the Commission in promulgating the domestic bill of lading without authority of law:

> (*a*) The form of domestic bill of lading ordered by the Commission would eliminate the provision of the existing bill which exempts the carriers from liability on account of loss or damage due to riots or strikes, and would limit that provision to delay as distinguished from loss through those causes.
>
> (*b*) Section 1 and section 4 of the forms of bill of lading ordered by the Commission for domestic and export traffic require the carriers

to assume *carrier* liability as distinguished from that of *warehouseman* for 48 hours after notice of arrival of property at destination and also during free time and after notice of arrival and placement.

(*c*) The order eliminates from the domestic bill section 2 limiting the liability of the initial carrier to its own line except where the law provides otherwise.

(*d*) The order strikes from the domestic and export bills of lading the provision which terminates liability when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains. (Rec. 5–6.)

It is further alleged that the order in question increases the liability which the carriers are required to assume beyond the liability which the law would establish in the absence of any limitation in the bill of lading, as follows:

(*a*) In requiring both in the export and domestic bills of lading prescribed that the period during which the carrier's liability shall continue *as a carrier* is extended to include the entire free time allowed by the tariffs.

(*b*) In the requirement in the concluding provision of the second paragraph of section 1 of the domestic and export bills that where carrier liability depends on negligence, burden to prove freedom from negligence shall be on the carrier.

(*c*) In the requirement that the consignor shall be relieved from liability for freight

charges where the consignor stipulates that the carrier shall not make delivery without requiring payment of such charges, and the carrier shall nevertheless make delivery without requiring such payment.

(*d*) In the elimination from the bills of lading in current use of the provision (section 9) relative to the liability of carriers by water, thus requiring carriers to undertake carriage by water under greater liability than is prescribed by the common law and the statutes of the United States. (Rec. 6–7.)

Finally, it is alleged that the Commission's order is unlawful in attempting to require the elimination from the domestic bill of the customary provision for establishing the actual value of the property at the place and time of shipment as the basis for the settlement of claims for loss or damage; and that the order as a whole deprives plaintiffs of their property without due process of law, is without lawful warrant, and is in violation of the fifth amendment to the Constitution.

PROCEEDINGS BEFORE THE COMMISSION.

Efforts have been made by carriers for some years to bring into general use uniform bills of lading. These efforts met with some success, and in November, 1904, the Interstate Commerce Commission, acting upon numerous complaints from shippers, instituted a general inquiry into certain proposed changes in the provisions of bills of lading in use by carriers. The main object of this investigation was to formulate

a just and reasonable uniform bi be used by all carriers subject to the act to regulate commerce. Extended hearings were had and in June, 1908, the Commission filed its report. (*In the Matter of Bills of Lading*, 14 I. C. C. 346.) At that time there was no express provision in the act to regulate commerce making it the duty of carriers to establish "just and reasonable regulations and practices effecting * * * the issuance, form, and substance of tickets, receipts and bills of lading." The Commission in that report said (p. 349):

> we do not attempt to go further at this time than to approve of what may be called a standard bill of lading.
>
> Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority. Moreover, the situation makes no demand for a positive direction.

As a result of that decision the uniform bill of lading, approved by the Commission, has been adopted and put into use by very many of the railroad systems of the United States.

Since the report above referred to Congress has legislated upon the subject of bills of lading, by amending the substantive law in section 1 of the act to regulate commerce, and in other acts which will be hereafter referred to. After these amendments of the law many complaints were m the Commission, to the effect that certain provisions in the uniform bill now in use were in conflict with recent legislation,

and were unjust and unreasonable and therefore unlawful. The Commission, therefore, upon its own motion and in extension of the former proceeding—as authorized by section 15 of the act to regulate commerce—instituted a further investigation into the practices of carriers with respect to the issuance, forms, and substance of bills of lading in use. The order was entered May 6, 1912, and, in part, reads as follows (*Report of the Commission herein*, p. 687, Rec. p. 27):

> For the purpose of determining whether the rules, regulations, and practices in connection with the issuance, transfer, and surrender of bills of lading, the conditions contained therein and other practices connected therewith are unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provisions of the aforementioned statutes, should any violations be disclosed by said investigation.
>
> *It is further ordered*, That a copy of this order be served upon each carrier subject to the act to regulate commerce.

The notice was served upon the carriers named and shippers were invited to appear and be heard. A list of the carriers, including the appellees, the Director General of Railroads, shippers, state boards of railroad commissioners, associations, and boards of commerce which appeared and took part in the investigation is

given at the beginning of the Commission's report on pages 672 to 676, inclusive.

At the hearing the carriers presented and proposed for approval the uniform bills in use with some modifying clauses. The shippers and others objected to certain provisions in the bills proposed. The manner of procedure is set forth in the report. It began with a conference, under the auspices of the Commission, between representatives of various classes of shippers and a committee appointed by the carriers. Regarding this meeting, the Commission says (Report, p. 688):

> As a result of this conference many differences of opinion, manifested in the outset, in respect to many of the provisions proposed by the respective parties to be incorporated in the uniform domestic and export bills of lading, were either harmonized or brought to clearly defined issue. The forms showing the provisional conditions agreed upon and those as to which agreement could not be reached have been printed by the Commission (Appendixes A and C), and by common consent have been accepted by all parties as working models for the domestic and export bills that shall finally be recommended (Appendixes B and D). The phraseology of the conditions as to which agreement could not be reached are printed in underscored italics and the shippers' counter proposals, where any were made, are printed in a parallel column in black-face type on the back of the form. This mechanical arrangement facilitates the reference to the phrase-

ology and language as to which the differences of opinion still exist.

These appendixes are at the conclusion of the Commission's report and the italicized portions show the clauses which were at issue before the Commission for determination. A large amount of evidence was taken upon these issues, where testimony could throw any light upon them; briefs were filed, and much time given to oral arguments. There is no charge that the parties were not accorded a full hearing by the Commission. After due consideration the Commission filed its report in writing, finding that certain provisions in the bills of lading presented by the carriers, to be used in domestic and export transportation, were unjust, unreasonable and unlawful, and entered the order in controversy. By this order the carriers are required to cease and desist, on or before August 8, 1919, from using the forms in use and are directed to adopt and put into use the modified forms prescribed by the Commission.

What the Commission did, and what it claims it had the right to do, was to take the forms of bills of lading in use and proposed by the carriers, and, considering objections to specific clauses, rules, and regulations contained therein or proposed by the carriers, to determine whether such clauses, or any of them, were unlawful under the Act to regulate commerce, and, if so, to prescribe what would be just and reasonable rules, regulations, conditions or requirements to be inserted in lieu of the ones found

to be unlawful, and to direct the carriers to adopt and use the modified forms.

PROCEEDINGS IN THE DISTRICT COURT.

The case was heard in the district court before Ward, circuit judge, and L. Hand and Mayer, district judges, upon a motion by the appellees for an injunction *pendente lite*, and motions by the United States and the Interstate Commerce Commission to dismiss the petition. The only evidence before the court was the verified petition of the appellees, and the sworn answer and the report and order of the Inter-State Commerce Commission. An opinion by Circuit Judge Henry G. Ward, presiding, concurred in by District Judge Julius N. Mayer, was filed (Rec. pp. 109–112) in which it was held (Rec. p. 110):

> Congress has unquestionably the power to declare what terms common carriers subject to the interstate commerce act of 1887 and its amendments may or may not insert in their bills of lading, and it has done so from time to time. For the purpose of this case we shall assume that Congress can delegate this legislative power to the Interstate Commerce Commission, but we shall expect to find such delegation in clear and unmistakable language. Examination of the statutes does not convince us that Congress had any intention to confer upon the commission the right to prescribe the terms of the carriers' bills of lading.

A dissenting opinion was filed by District Judge Learned Hand (Rec. pp. 113–118.) The motions to dismiss the petition were denied and the motion for a preliminary injunction was granted and an order duly entered. (Rec. pp. 119–120.) From this order an appeal was taken to this court by the United States and Interstate Commerce Commission, under the act of October 22, 1913 (38 Stat. 220; Comp. Stat. sec. 998).

SPECIFICATION OF ERROR.

The district court erred:

1. In holding and adjudging that the Interstate Commerce Commission was and is without power and authority after full hearing to enter the order in controversy, dated April 14, 1919, in the proceeding entitled *In the Matter of Bills of Lading*, No. 4844.

2. In finding and deciding that under section 15 of the act to regulate commerce the Commission has power only over "rates, classifications, regulations, or practices in connection with the receiving, handling, transporting, storing, and delivery of property," and not over bills of lading.

3. In finding and deciding that while the Commission has power, under section 12 of the act to regulate commerce, to investigate the fairness of the carriers' bills of lading, it is not authorized "to draw the carriers' bills of lading either in whole or in part."

4. In finding and deciding as follows: "We shall not inquire whether the alterations the Commission has prescribed in the bills of lading are reasonable or

not, because we think it has no power to prescribe an inland bill of lading * * * depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of the Harter Act."

5. In entering an interlocutory order or degree granting the preliminary injunction broader in terms and effect than the case alleged and the relief prayed in the petition.

6. In overruling the motions of the United States and of the Interstate Commerce Commission to dismiss the petition. (Rec. 122–124.)

THE ISSUE.

The fundamental question involved is: Has the Commission jurisdiction to determine, after hearing, that specified provisions, rules, and regulations contained in bills of lading in use by carriers subject to the act to regulate commerce, are unlawful, and, to prescribe what will be just and reasonable rules and regulations to be thereafter adopted and followed; and to order the carriers to cease and desist from such violations of the act and conform to and observe the rules and regulations so prescribed?

ARGUMENT.

I.

DID THE COMMISSION HAVE JURISDICTION TO MAKE THE ORDER?

The answer to this question requires a clear definition of the duties of the Commission, its place in the scheme of regulation and the substantive law governing carriers, contained in the act to regulate commerce.

1. *Statutory provisions.*—By section 12 of the act to regulate commerce it is provided that the Commission shall have authority to inquire into the management of the business of common carriers subject to the act—

> and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and the Commission is hereby authorized and required to execute and enforce the provisions of this act; * * *.

By section 15 of the act, it is provided—

> That whenever, after full hearing * * * under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion, * * * that any individual or joint classifications, regulations, or practices *whatsoever* of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial *or otherwise in violation of any of the provisions of this act*, the Commission is hereby authorized and empowered to determine and prescribe what * * * regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which

> the Commission finds the same to exist, * * *, and shall conform to and observe the regulation or practice so prescribed.

2. *Judicial construction.*—Defining the character of the Commission, this court, speaking through Mr. Justice McKenna, in *Int. Com. Comm.* v. *United States ex rel. Humboldt S. S. Co.* (224 U. S. 474, 484), said:

> The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act.

In *United States* v. *L. & N. R. R.* (235 U. S. 314, 320) the court, speaking through the Chief Justice, said:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

In *Int. Com. Comm.* v. *Chi. R. I. & P. R. Co.* (218 U. S. 88, 108) the court, again speaking through Mr. Justice McKenna, said:

> As we have said, the Commission is the tribunal that is entrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers * * *

In the *Minnesota Rate Cases* (230 U. S. 352) this court, speaking through Mr. Justice Hughes, said:

> The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; * * *

The duty imposed upon the Commission to administer and enforce the act to regulate commerce, carries with it powers of regulation, which are not specifically, or expressly stated in the act as, for instance, the tariff regulations in which perishable freight shall be precooled and preiced for shipment and the charges therefor (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199); to determine the reasonableness of demurrage rules (*Proctor & Gamble Co.* v. *United States*, 225 U. S. 282); to fix the divisions of through rates with tap lines to prevent rebating (*Tap Line Case*, 234 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457); to determine rights to switching privileges (*Penna. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R.* v. *United States*, 238 U. S. 1); to regulate the distribution of coal cars (*Int. Com. Comm.* v. *Ill. Cent. R. R. Co.* 215 U. S. 452); to construe tariffs and determine the duties and obligations of the carriers thereunder (*Texas & P. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43).

In all questions arising under the act regarding the duties required of common carriers by the act, the determination by the Commission is primary and exclusive. (*Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry.* v. *American Tie Co.*, 234 U. S. 138; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 304; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43.)

In *Mitchell Coal Co.* v. *Penna. R. R.*, *supra*, the court, speaking through Mr. Justice Lamar, said (p. 255):

> The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally * * *.

In *Penna. R. R. Co.* v. *International Coal Co.* (230 U. S. 184, 196), Mr. Justice Lamar, speaking for the court, said:

> So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.

In the *Minnesota Rate Cases*, speaking through Mr. Justice Hughes, the court said:

> as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the prelim-

> inary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.

In *Texas & Pac. Ry. Co.* v. *American Tie Co., supra,* the rule was stated by the court, speaking through the Chief Justice (p. 146), as follows:

> It is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute.

In *Loomis* v. *Lehigh Valley R. R. Co.*, the court, speaking through Mr. Justice McReynolds, said (p. 50):

> In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. (*Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220.) And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. (See *Penna. R. R.* v. *Puritan Coal Co., supra,* pp. 128, 129; *Penna. R. R.* v. *Clark Coal Co., supra,* pp. 469, 470.)

From the foregoing authorities it is clear that the Commission has jurisdiction and power to determine what are unjust and unreasonable rates, charges, regulations, and practices, and to order the carrier to cease and desist from unlawful acts and to comply

with the reasonable rates, charges, regulations, and practices prescribed as reasonable by the Commission. There are certain provisions in the act conferring jurisdiction upon the courts to issue mandamus to compel the performance of services by the carrier; for example, compelling the movement of traffic and the furnishing of cars or other facilities for transportation. (Sec. 23.) But where the act forbids the charging of unjust and unreasonable rates, the making of unjust and uneasonable rules and regulations or unjust and unreasonable practices, it raises the administrative question, to be determined by the Commission, whether the rates, rules, regulations, or practices by the carriers are in fact unjust and unreasonable, and therefore unlawful. Not all discriminations are unjust or unreasonable. It is a question of fact in each case whether rates, regulations, or practices complained of are unjust and unreasonable, to be determined by the administrative tribunal created to enforce the act. (*Commission* v. *B. & O. R. R.*, 145 U. S. 263; *Tex. & P. Ry.* v. *Int. Com. Comm.*, 162 U. S. 197, 219; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.) If the courts may not determine these administrative questions, as this court has clearly held, then the requirements of the act hereafter quoted as to bills of lading must be without any tribunal to enforce them if this Commission does not possess that power. But the Commission's power to enforce all the provisions of the act—except where power to do so is expresssly

vested in the courts—is so clearly stated in the act and in the decisions of this court, that it only remains to examine the act to determine whether, as now amended, it forbids the carrier from doing any things in reference to the issuance, form, and substance of bills of lading that are unjust and unreasnable, and declares unjust and unreasonable acts in reference thereto unlawful.

3. By an act to create a commerce court and to amend the act entitled "An act to regulate commerce," etc., approved June 18, 1910 (c. 309, 36 Stat. 539), it is, *inter alia*, provided:

> SEC. 7. That section 1 of the act entitled "An act to regulate commerce," approved February 4, 1887, as heretofore amended, is hereby now amended so as to read as follows: * * *.
>
> "And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form, and substance of tickets, receipts, and bills of lading, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and

practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

By an act commonly known as the Cummins amendment, approved August 9, 1916 (c. 301, 39 Stat. 441), it is provided:

> That any common carrier, * * *, receiving property for transportation * * * *shall issue a receipt or bill of lading therefor,* and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country *when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever,* shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation * * * *shall be liable to the lawful holder of said receipt or bill of lading* or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, *for the full actual loss, damage, or injury to such property* caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent

> foreign country when transported on a through bill of lading, *notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading,* or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; *and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void:* * * *. [Italics ours.]

These amendments requiring that all regulations and practices affecting the issuance, form, and substance of bills of lading shall be just and reasonable, and prohibiting any limitation of the carrier's liability for loss of, or damage to, property transported by provisions in the bill of lading, call for supervision and enforcement by the Commission under the provisions of section 12. The power to make investigations of such regulations and practices, in the form and substance of the bills of lading used by carriers, is clearly contained in the provisions of section 15. And the Commission is expressly authorized by section 15, if it finds any such regulations or practices in the issuance, or the form, or the substance of these bills unjust and unreasonable, to prescribe "what will be the just and reasonable regulation, practice, form, or substance" of bills of lading. The Commission does not initiate a bill of lading; it investigates the regulations and conditions in the bill of lading in use by carriers and determines whether any specific pro-

visions therein violate express provisions of the law, or are unjust and unreasonable, and bases its order upon its findings.

As before noted, when the Commission made its first report (14 I. C. C. 346) the requirements contained in the two amendments above quoted were not in the act.

By an act approved August 29, 1916, entitled "An act relating to bills of lading in interstate and foreign commerce" (c. 415, 39 Stat. 538) Congress provided for negotiable and nonnegotiable bills of lading, made certain requirements as to the duties and obligations of carriers, and the rights of shippers, consignees, and endorsees under such bills. This act constitutes a part of the law of Congress upon the subject. It does not, however, in any way lessen the force and effect of the amendments to the act to regulate commerce above quoted. The Commission, in passing upon the regulations and practices regarding the issuance, forms, and substance of bills of lading under the act to regulate commerce, will give consideration and force to this bills of lading act—that is to say, it will not permit the carriers by any regulation or practice in the issuance, or the form, or the substance of bills of lading to violate the requirements of this act. The power and jurisdiction of the Commission, however, is determined by the act to regulate commerce.

We respectfully submit that in view of the foregoing, there can be no question that the Commission had jurisdiction to issue the order in controversy.

II.

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER?

The allegations of the petition are very general in character. There are no specific allegations of fact entitling the appellees to the relief prayed for. In Paragraph VII of the petition it is alleged—

> The Commission has, without supporting evidence, undertaken to require the elimination of current provisions in the bill of lading long in use by petitioners and others, and the modification of other provisions in that bill. The provisions which are directed to be stricken out are not in conflict with any rules of law.

It may be true that the provisions in the bill of lading which the Commission has eliminated or changed were lawful when adopted. But such contracts may become unlawful by a change in the law. (*Armour Packing Co.* v. *United States*, 209 U. S. 56.)

The questions involved are mainly questions of law arising on the face of the bills of lading in use or proposed by the carriers. A large amount of testimony was heard by the Commission and a full opportunity was given the appellees and others to introduce any evidence which they desired and which had any bearing, or would throw any light, upon the issues before the Commission. The petition does not offer to produce the record of evidence before the Commission, as is usually done in cases where any reliance is placed upon the allegation that there was not

substantial evidence to support the order. The sworn answer of the Commission denies each allegation in the petition that there was no evidence to support the findings and order and alleges affirmatively that there was evidence to support the same. The rule established by this court is that where a petitioner does not present the record before the Commission for examination by the court, the findings of fact by the Commission are accepted as correct and as supported by evidence (*L. & N. R. R. Co.* v. *United States*, 238 U. S. 1; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Ill. Cent. R. R.* v. *Chicago & Alton R. R.*, 215 U. S. 479). And when the record is presented to the court it will not pass upon the sufficiency of the evidence, but only determine whether there was any substantial evidence to support the order. (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482; *United States* v. *L. & N. R. R.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.) Even where the facts are undisputed it is not a question of law as to whether the facts constitute unjust or unreasonable discrimination, but an administrative question to be determined by the Commission. (*United States* v. *L. & N. R. R. supra.*) The issues before the Commission in this case were clearly defined, the facts are reviewed, and the lawfulness of the provisions assailed are determined by the Commission in its report.

We submit, therefore, that upon these general allegations in the petition, denied by the sworn answer of the Commission, the appellees are not entitled to the relief prayed for, and the motions to dismiss the bill should have been allowed.

In presenting their case in the court below appellees did not insist upon all of their contentions before the Commission. We shall, therefore, discuss the questions raised by the appellees in the court below in the order in which they appear in the dissenting opinion of Judge Learned Hand.

III.

ELIMINATION OF THE EXEMPTION FOR LOSS AND INJURY DUE TO STRIKES AND RIOTS.

The provision in the bill presented proposed by the carriers, section 1, clause 4, provides:

> Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage, or delay occurring * * * from riots or strikes, * * *.

This provision was to apply to carrier liability while the goods were in transit. The Commission's finding and ruling upon this provision is found on page 705 of the Commission's report, and reads as follows:

> Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this

> clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for "delay caused by riots or strikes," as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable.

The finding of the Commission is supported by many judicial opinions. The statement of the law upon losses caused by strikes and mobs is succinctly stated by the author in section 415, Volume X, Corpus Juris, and is supported by authorities there cited. We adopt the author's statement, which reads:

> *Strikes and mobs.*—The carrier is liable for the negligent or wrongful acts of its servants during the course of their employment, and therefore if its employees go on a strike, abandoning the performance of their duties and causing delay in the transportation of goods in their charge or control, the carrier is liable, the delay being due to the employees' wrongful acts. And after the employees have quit the carrier's employment it is its duty to promptly supply their places, if practicable. But where the strike which caused the delay is not that of the carrier's employees, and the carrier does all that it can to expedite delivery, it is not liable for the delay. So a carrier is not liable for delay due to a riot not engaged in by its employees, which riot renders the running of trains unsafe

> or impossible. And if, after leaving the carrier's employment, the employees, by violence, cause delay in the transportation, so as to prevent the carrier from proceeding with his business, the delay thereby occasioned will be excusable. If by mob violence the carrier is prevented from performing its obligations to transport goods in its charge or control, it will be excused for resulting delay. The only duty resting on the carrier not otherwise in fault is to use reasonable efforts and due diligence to overcome obstacles thus interposed and to forward the goods to their destination; but this duty is one which it is bound to observe.

The appellees referred to the Carmack and Cummins amendments wherein the phrase "caused by it" is used, and contended that that phrase limited their liability to losses actually caused by them—that is, directly attributable to the acts of the carrier. This construction is unwarranted.

This phrase "caused by" was considered by this court in *Galveston, H. & S. A. Ry. Co.* v. *Wallace* (223 U. S. 481, 491), where the carriers insisted that this phrase cast upon the shipper the burden of proving that a loss or damage was *caused by* the carrier, insisting "that the Carmack amendment did not make it an insurer." The court rejected this construction of the act. And again in *Chi. & E. I. R. R. Co.* v. *Collins Co.* (249 U. S. 186, 191), the carriers again made the claim that this phrase in the Carmack amendment "cast upon the shippers the burden of proving affirmatively that the loss which occurred on

a connecting line was 'caused by' the connecting carrier." This construction was again held untenable.

The Carmack amendment extended the liability of the initial carrier for any loss, damage, or injury caused "by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass," etc., and the Cummins amendment, now in force, prohibits any restriction of common-law liability by stipulation or agreement in the receipt or bill of lading except that as to property other than ordinary live stock the liability for loss may be restricted to a value placed upon the property by the shipper to secure a reduced and released rate, which rate has been approved by the Commission. It is clear that these amendments in no way change the existing common-law liability in any other particulars than those stated. At common law the initial carrier was not liable for damage or loss caused by a connecting carrier to whom the goods were delivered for further transportation. At common law and under the rulings of this court restrictions upon the carrier's liability, other than for the carrier's negligence, could be made by contract or agreement; this contract privilege is entirely cut off by the Cummins amendment except as to released rates approved by the Commission.

We submit, therefore, that the Commission committed no error in its ruling regarding strikes and riots.

IV.

LIMITING THE LIABILITY OF THE INITIAL CARRIER.

This provision is in direct conflict with the Carmack-Cummins amendment making the initial carrier liable for loss and damage beyond its own line. (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.) This liability extends not only to carrier liability while the goods are in transit but also to losses and damages for which the carriers are liable as warehousemen. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.)

Clearly there was no error in eliminating this provision limiting the liability of the initial carrier to its own line.

V.

CARRIER LIABILITY DURING "FREE TIME."

Section 4, clause 1, of the bill of lading proposed by the carriers, contained this provision:

> Property not removed by the party entitled to receive it within 48 hours (exclusive of Sundays and legal holidays) after notice of its arrival has been duly sent or given, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, * * *.

This provision was objected to by the shippers, and the counter proposal of the shippers was:

> The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law.

The Commission discuss the proposition in the report (pp. 712, 713). The principle involved is also discussed by the Commission in its report under section 1, clause 3 and clause 4, on pages 695 to 705, inclusive.

Before the Commission the carriers, including appellees, pressed their claim for a definite period to eliminate in all cases any question as to when the carrier liability ceased and the liability of the carrier as warehouseman began. The general rule has been recently stated by this court in *Erie R. R. Co.* v. *Shuart et al.* (250 U. S. 465, 468). The court, speaking through Mr. Justice McReynolds, said:

> In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated, and controlled by the railroad. If its employees had then been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed [in the bill of lading], was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal. (See Hutchinson on Carriers, secs. 711, 714, 715.)

The question as to what is a "reasonable time" for unloading depends upon the character of the traffic, the conditions of shipment, notice of arrival, and the general custom at the point of delivery in regard to the traffic.

What is a reasonable time in a given case is a question of fact and not a question of law. It may be determined in certain cases by a jury or it may be determined, as to interstate traffic by this Commission. When interstate commerce is affected it is a Federal question. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.) It is not a matter that directly lessens the liability of the carrier as determined by the Carmack and Cummins amendments. It was, therefore, clearly within the jurisdiction of the Commission to permit a fixed time after due notice to the consignee at the expiration of which carrier liability should cease and liability as a warehouseman should begin. The only limitation upon the Commission being that it could not determine the question arbitrarily by fixing an unreasonably short time or determining the question without consideration of some substantial evidence as to what was a reasonable time. As already stated, what is a reasonable time is to be determined upon a consideration of the custom at point of delivery. Three general rules are stated by Hutchinson on Carriers, Volume II, third edition, sections 701 to 704, inclusive. Under what is known as the Massachusetts rule, the liability of the carrier as an insurer ends

when the goods have arrived at their destination and, even without notice to the consignee, have been safely deposited upon the platform or in the warehouse of the terminal carrier. Under the New Hampshire rule such liability ends when the goods have arrived at destination and a reasonable time during which they might have been removed has elapsed, no actual notice of arrival being required. By the New York rule, sometimes called the Michigan rule, if the consignee is present when the goods arrive, he must take them without unreasonable delay; if he is not present he must be notified, if in the immediate vicinity, of the arrival of the goods and then must have a reasonable time in which to remove them. The latter rule, requiring knowledge or notice of the arrival, seems to be the most reasonable. As to what time must be allowed after notice or knowledge of the arrival is a question of fact which may be determined as already stated by the Commission.

The question of a reasonable time for unloading arises in the case of demurrage. Before demurrage can be charged a "reasonable time" must be given for unloading. The reasonableness of regulations fixing the time and the amount of demurrage is an administrative question to be determined by the Commission. (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282.) The times applicable to different classes of traffic fixed by demurrage rules were before the Commission and this, while not controlling, was sub-

stantial evidence which the Commission could consider in fixing a reasonable time for unloading where carrier liability is involved. It can not be said, therefore, that the decision of the Commission was without substantial evidence and its conclusion on that ground can not be assailed in court.

The reasoning of the Commission is found in its report at the pages above cited, and its conclusion upon this point was:

> The rule can not be approved in the form proposed by the carriers. In lieu thereof we are of the opinion that a rule phrased as follows would be just and reasonable:
>
> "Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only or, at the option of the carrier, may be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

This rule gives a definite measurement to what is a "reasonable time" for unloading, namely, "the free time allowed by tariffs lawfully on file * * * after notice of the arrival of the property * * *." The notice to be given is further specified. In the view of the Commission, therefore, under all the facts considered, the "free time" in the tariffs governing demurrage constituted "a reasonable time for unloading" before carrier liability ceases and that of warehouseman begins.

As already stated this is a question of fact to be determined by the Commission. It had before it substantial evidence and as stated by this court the weight of that evidence will not be determined by the court, or, as stated by Mr. Justice Lamar in the *Union Pacific R. R. case, supra:*

> It will not consider the expediency, or wisdom of the order, or whether, on like testimony it would have made a similar ruling. (Id. p. 547.)

A rule determining what is a reasonable time is of public importance. Under the law as it now exists the chances of litigation growing out of the uncertainty of the time are considerable and a definite rule fixing the time in each case will tend to settle controversies.

We submit, therefore, that as to this point the motions to dismiss should have been granted.

The next question raised, as to delivery on private sidings, and the following, as to the liability of the consignor for freight delivered without requiring

payment, are administrative questions which fall clearly within the jurisdiction of the Commission.

VI.

BURDEN OF PROOF.

Casting the burden of proof upon the carriers on all issues of negligence does not change or affect their liability. The Commission followed the rule of evidence announced by this court in *Galveston, H. & S. A. R. Co.* v. *Wallace* (223 U. S., 481, 491, 492), where this court, speaking through Mr. Justice Lamar, said:

> Under the Carmack amendment, as already construed in the Riverside Mills case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another State, it is conclusively treated as having made a through contract. * * * This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both

> to prove their case and to disprove the existence of a defense.

The foregoing case is also cited and followed in *Chicago & E. I. R. R. Co.* v. *Collins Co.* (249 U. S., 186, 191).

The principle here announced disposes of the objection of the appellees to this ruling of the Commission.

VII.

VALUE AT POINT OF ORIGIN.

The domestic bill in use and proposed by the carriers provides, section 2, clause 3, that in case of loss or injury—

> the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at place and time of shipment under this bill of lading, including the freight charges, if paid; * * *

This provision was in the uniform bill of lading approved by the Commission in its decision in 1908. It is now rejected because of the provisions of the Cummins' amendment. The sole question arises as to the effect of the Cummins' amendment already quoted. That amendment declares that the carrier—

> shall be liable to the lawful holder thereof for any loss, damage, or injury to such property * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, * * * from the liability hereby imposed.

As already noted, there is a provision validating restricted rates which have been approved by the Commission, but this proviso has no bearing upon the question now being discussed.

There can be no question, and the court may take judicial notice of the fact, that the value of the property at point of origin, generally speaking, is less than its value at the point of destination. The point of origin is the producing territory while the point of destination is usually the primary and other markets for the goods. The common law rule was and is that in case of such loss the damages are to be measured by the value of the property at the point of destination.

> The general rule is that, when goods delivered to a carrier for shipment are lost in transit, the carrier will be liable for the market value of the goods at the place of destination at the time when delivery of the goods should have been made, less the freight charges to the point of destination if they have not already been paid.
>
> *In case of injury.*—Similarly, where goods intrusted to a carrier for shipment are injured through causes for which the carrier is responsible, the owner of the goods is entitled to recover the difference between the value of the goods at the time and place of delivery in an uninjured condition and their value in the depreciated condition in which they were delivered, less the freight charges to the point of destination if they have not already been paid. (Sec. 606, vol. 10, Corpus Juris, *New*

York, etc., R. Co. v. *Estill,* 147 U. S. 591; *Mobile, etc., R. Co.* v. *Jurey,* 111 U. S. 184; *Canadian Pac. R. Co.* v. *Wieland,* 226 Fed. 670.)

If the common-law rule is not followed, but the value at point of origin is taken as the measure, the damages for the loss of the property are materially lessened. For illustration (and this is an actual case), five cars of wheat were purchased in Kansas City and shipped to Chicago; relying upon the delivery of the grain in Chicago, the consignor, who was the purchaser in Kansas City, sold the grain for delivery in Chicago during the current month. Four cars duly arrived, but one went astray and was not located for some time after the current month. The result was that the purchaser had to buy in the Chicago market a car of grain to enable him to perform his contract. The price of grain having advanced he was subjected to considerable damage by reason of the failure of the carrier to deliver the car. If the carrier's liability in that case was determined by the value of the car of grain in Kansas City, at the time of its receipt by the carrier, it is apparent that the full damages sustained by the shipper could not be recovered and he would be the loser of a considerable sum by reason of the failure of the carrier to perform its carrier obligations. The validity of this clause in the bill of lading, under the Cummins amendment, came before the District Court for the District of Minnesota, fourth division, and Morris, district judge, referring

to the stipulation in the Cummins amendment "shall be liable * * * for the full actual loss * * * caused by it * * * notwithstanding any limitation * * * in any * * * bill of lading," held:

> I do not see how it is possible to escape the conclusion, upon a fair and open minded consideration of the language of the amendment and the obvious and the well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery and is, therefore, unlawful and void.

The Commission, in view of the provisions of the Cummins amendment, struck out of the domestic bill this provision making the value of property at point of origin, less freight charges not paid, the measure of damages, and relegated the carriers to their common-law liability whatever that may be in particular instances.

This provision is, however, retained in the export bill for the reason that the Commission thought the Cummins amendment did not apply to foreign commerce.

VIII.

THE ELIMINATION OF CLAUSES PROTECTING WATER LINES.

The Commission makes no claim to jurisdiction over the ocean carriers of commerce to or from nonadjacent foreign countries. It does claim jurisdiction over the inland carriers engaged in moving foreign commerce to or from the ports. Section 1

of the act to regulate commerce, describing the transportation subject to the act, reads *inter alia*—

> from any place in the United States to an adjacent foreign country, * * * also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

From this it seems clear that the act and the jurisdiction of the Commission extend to the transportation of foreign commerce from interior points in the United States to the ports of transshipment to ocean vessels and from the ports of entry in the United States or an adjacent foreign country to points within the United States. Where the carriers subject to the act to regulate commerce, and to the jurisdiction of the Commission, engage in foreign commerce and issue through bills of lading to foreign ports the bills of lading which are issued by them are subject to regulation by the Commission. And carriers subject to the act may not issue any export bills or receipts for property under unjust and unreasonable regulations, either as to their issuance, form, or substance. These carriers could be restricted to issuing bills of lading from the points of origin to the ports and leave the shippers to make arrangements with, and take bills of lading from, the ocean carriers at the port, but to facilitate foreign

commerce carriers subject to the act are permitted to issue export bills of lading, thus carrying the traffic through the port to the ship. In granting this privilege in the interest of commerce, Congress has not surrendered its full jurisdiction over the carriers engaging in it and the provisions of the act forbidding unjust and unreasonable rules, regulations, and practices, in the particulars named in the act, apply to export and import traffic.

Congress has exercised its powers of regulation over foreign commerce by water in what is known as the Harter Act (c. 105, 27 Stat. 445). The provisions of this act do not apply to inland rail carriers but are applicable to ocean carriers, although the traffic is carried on under export bills of lading. In the export bill the Commission has considered and enforced the duties of rail carriers, under the act to regulate commerce, as primary duties in conducting the inland part of the transportation, carefully guarding these provisions so as not to interfere with the provisions of the Harter Act which apply to the ocean carriers.

The Carmack amendment applied by its terms to transportation of property from "a point in one State to a point in another State." This did not include foreign commerce.

The Cummins amendment specifies the commerce to which that amendment applies and includes transportation "from any point in the United States to a point in an adjacent foreign country," but does not include transportation to a nonadjacent foreign

country. The limitations in these amendments upon the right to restrict liability and to fix a measure of damages in case of loss or injury to property transported does not apply to foreign commerce with a nonadjacent foreign country. For this reason the Commission has permitted certain provisions to remain in the export bill limiting the carrier's liability where like provisions are excluded from the domestic bill. The discussion of this question by the Commission is found in its report (pp. 726–740).

Until we are advised by the appellees' brief of the particular rulings by the Commission regarding provisions in the export bill to which they object, we shall content ourselves by referring the court to the reasoning and conclusions of the Commission in its report, reserving for a reply brief a discussion of provisions in the export bill which are specifically complained of by the appellees.

CONCLUSION.

For the reasons herein stated we submit that the court below erred in refusing to grant the motions of appellants to dismiss the petition, and in granting the motion for an injunction.

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NOVEMBER, 1919.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 541.

United States of America and Interstate Commerce Commission, Appellants,

vs.

Alaska Steamship Company et al., *Appellees.*

BRIEF FOR CARRIERS UPON THE EFFECT OF THE TRANSPORTATION ACT OF 1920.

On March 22, 1920, the Court entered this order:

> "Counsel are requested to file briefs concerning the effect upon the issues herein involved resulting from the Act of Congress terminating the Federal control of railroads,

and amending the Act to Regulate commerce in certain particulars, approved February 28, 1920."

We comply with this request by noting herein the bearing of the Amendment of February 28, 1920 (Transportation Act) on the several points made, and in the order made, in our original brief.

FIRST POINT.

No authority is given the Commission by the Transportation Act to draw the carriers' bills of lading.

Section 1 of the Act to Regulate Commerce (page 5 original brief) requires railroads "to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form, and substance of * * * bills of lading." The Transportation Act of 1920, (Sec. 400, subd. 6) re-enacts this duty without change of language.

Section 15 of the Act to Regulate Commerce (page 5 original brief) on which the Commission relied for power has been re-enacted in Sec. 418 of the Transportation Act without change, except that the Commission is granted power to fix "the maximum or minimum" rates.

Section 12 (page 14 original brief) was not amended by the Transportation Act.

Commissioner Clark at the hearings before the House Committee having in charge the bill which became the Transportation Act brought this case to the attention of the Committee and described the decision of the District Court as holding "that while Congress had undoubted right to prescribe the terms and conditions of the bill of lading, it has not conferred upon the Commission the power to prescribe them." See Hearings, 66th Cong. 1st Session on H. R. 4378, July 15-22, 1919, p. 138.

Although Congress re-enacted Sections 1 and 15 as above pointed out, it did not broaden the Commission's authority. The law was re-enacted so far as the subject-matter of bills of lading is concerned without change, leaving the right and power to make the bill of lading contract solely with the carrier and shipper. The Commission is left with the same power of review in case of unjust discriminations, undue preferences, etc., as it had before.

This re-enactment of existing law, substantially without change, is of the utmost significance in view of the decision of the District Court having been brought to the attention of Congress, which, by not changing the law, must be understood to have intended that the new law (as well as the old) should be understood as construed by the District Court, namely, that the Commission has no power to prescribe the bill of lading. That is to say, the

construction of the law expressed by the District Court is now impressed on the statute. This conclusion fairly results from various authorities. In *Lewis's Sutherland on Statutory Construction,* 2d Ed., Vol. 2, Sec. 403 (page 780), it is said:

> "*Re-enacted Statutes and Parts of Statutes.* In the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to intend that they should again have the same effect. The same rule applies to the readoption of a constitutional provision. It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words. The same principle applies when a statutory provision is taken from a constitutional provision which has been construed. The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it."

In *Sessions* vs. *Romadka,* 145 U. S. 29, 42, Mr. Justice Brown said:

> "Congress, having in the Revised Statutes adopted the language used in the Act of 1837, must be considered to have adopted also the construction given by this Court to this sentence, and made it a part of the enactment."

In *Logan* vs. *United States,* 144 U. S. 262, 302, (syllabus) it was said:

> "It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do is clearly expressed."

These conclusions are reinforced by that part of Section 441, subdivision 4, of the Transportation Act which provides "The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading." If the Commission already had the power (as argued on its behalf) to prescribe bills of lading this grant would have been wholly unnecessary. It is to be observed that the power is only with respect to form and does not touch substance of bill of lading. Vesting in the Commission power to prescribe rules and regulations for this class of forms of export bill of lading for traffic in American vessels by the familiar maxim excludes the power claimed by the Commission.

SECOND POINT.

Section 437 of the Transportation Act of 1920 shows (*a*) that the Commission's order in striking out the water clauses was illegal under the Interstate Commerce Act and (*b*) would continue to be illegal under the Transportation Act of 1920.

Section 437 amends the Carmack-Cummins Amendment of Section 20 of the Act to Regulate Commerce by inserting immediately before the first proviso the following language:

> "*Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water."

Looking to the explanation of Congressional purpose in Committee Reports (Binns *vs.* U. S., 194 U. S. 486, 495) we find in Report 456, H. R. 66th Cong. 1st Session (by Mr. Esch) to accompany H. R. 10453, page 31, that the purpose of Section 437 (carried as Section 435 in the bill H. R. 4378) was thus explained:

> "*Liability of water carriers.* Section 435 amends the so-called Cummins' amendment to section 20 of the commerce act so as to make it clear that where loss, damage, or injury occurs where the property is in the

> custody of the carrier by water the liability is to be determined by the law applicable to transportation by water, which confines liability to the value of the vessel and the freight money."

So the intention of Congress is shown to have been "to make it clear" that the Harter Act and other legislation as to water line liability were not (for the past) repealed by implication in enacting the Cummins Amendments, and (for the future) that water carriage statutes governed the liability, and not to change the law. The dissenting opinion of Judge Hand in the District Court was to the effect that the water carriage statutes had been repealed, and it was apparently the desire of Congress to make it clear that this was not so.

Section 437 of the Transportation Act is controlling law that the liability of the water carrier engaged in joint service with a rail carrier is to be determined by the laws and regulations applicable generally to transportation by water; and that the liability of the initial rail "carrier shall be the same as that of such carrier by water." This declaration of Congress makes it quite clear that the Commission's order requiring the carriers to assume liability from which they were excused by the Harter Act and similar legislation was without authority of law.

But if the amendment should be read as intending to change the law on this point—that is, if the amendment proceeded upon the assumption that the Cummins amendments repealed the water statutes, then the case has now become moot in this respect, since the Commission now, by virtue of section 437 of the Transportation Act, is without power to require carriers to waive the benefit of the water carriage statutes, as its order under review purports to do.

It is significant also that the Transportation Act in Section 418, re-enacting Section 15 of the Act to Regulate Commerce, repeated in subdivision 3 the command of the old section 15 that "any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." Re-enacting this clause shows the intent of Congress not to discriminate against water carriers which make joint rates with rail carriers.

Further proof that Congress did not intend the repeal of the water exemptions but on the contrary by express words preserved them is given by Section 441, subdivision 4, quoted *supra*, directing that "the protection of limited liability provided by law" shall be preserved in the through export bill of lading.

THIRD POINT.

This point was that "the Carmack-Cummins Amendments do not preclude a provision by which the value at place and time of shipment measures a loss."

The Transportation Act has no provision affecting this question.

FOURTH AND FIFTH POINTS.

These points are unaffected by any provision of the Transportation Act.

———o———

The argument in the carriers' original brief that Congress did not intend to entrust to the Commission regulation of the substance of bills of lading is emphasized by the Transportation Act of 1920. As in the Pomerene Act and in Section 20 of the Act to Regulate Commerce, Congress has made specific regulations, so in Section 438 of the Transportation Act Congress has made another specific regulation—of periods for notice for filing of claims and institution of suits—otherwise leaving to the carrier intact initiative under Section 1 of the Act to Regulate Commerce. Congress indicates that the matter is not for the administrative offices of the Commission.

The bill of lading prescribed by the Commission Appendix B, Trans. page 82) carries in Sec. 2 a provision that claims must be made in writing "within six months" in the case of do-

mestic traffic, and "within nine months" in the case of export traffic; and that suits "shall be instituted only within two years and one day after delivery of the property or after a reasonable time for delivery has elapsed."

Section 438 of the Transportation Act amends the Carmack-Cummins Amendments to Section 20 of the Interstate Commerce Act so that from the date of approval of the Transportation Act it is "unlawful * * * to provide by * * * contract * * * a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The provision as to two years' limitation of suits carried in the Commission's bill would thus be invalid because in conflict with this provision of the Transportation Act of 1920.

Respectfully submitted,

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MARCH 27th, 1920.

No. 541.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS.

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS IN RESPONSE TO THE ORDER OF THE COURT ENTERED MARCH 22, 1920.

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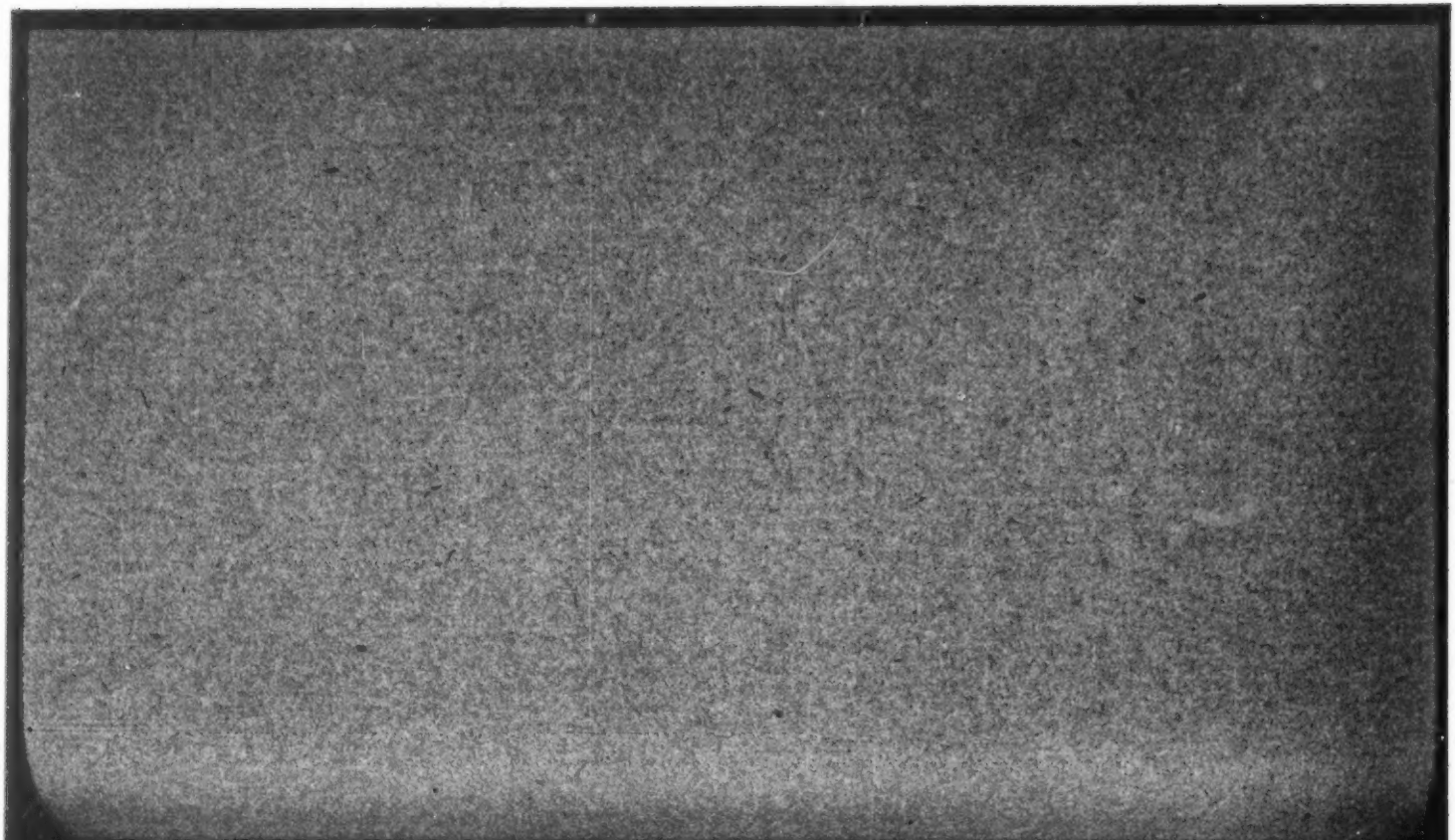

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellants,

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF Georgia Railway Company, Clyde Steamship Company, et al.

No. 541.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS.

The appellants respectfully submit this brief in response to the following order of the court, entered March 22, 1920:

> Counsel are requested to file briefs concerning the effect upon the issues herein involved resulting from the act of Congress terminating the Federal control of railroads, and amending the act to regulate commerce in certain particulars, approved February 28, 1920.

Those issues are:

First. Has the Interstate Commerce Commission, under section 15 of the interstate commerce act as existing, which confers on it the power to determine and prescribe whether any regulation or practice whatsoever of a carrier is or will be unjust, or unreasonable, or unduly preferential, or prejudicial, or otherwise in violation of the act and also confers the power to determine and prescribe what regulation or practice is or will be just, fair, and reasonable—authority to review the regulations and practices of carriers affecting the issuance, form, or substance of bills of lading, and to pass upon differences between shipper and carrier as to certain provisions in said bills, claimed to be unjust, unreasonable, or otherwise illegal, and to prescribe the form to be used on these subjects, so as to render the substance of said bills in said particular just, fair, and reasonable?

Second. Does such power extend to export bills, covering water carriage, and are the provisions made in conflict with the Harter Act?

Third. Are the provisions of such bills, covering interstate shipments partly by rail and water carriage, in violation, as to the water carriers, of the Harter Act?

Fourth. Are any of the specific changes ordered to be made in said bills, illegal, or beyond the power of the commission if the general power to prescribe changes is sustained?

In this case it is respectfully submitted that the act of Congress, approved February 28, 1920, termi-

nating the Federal control of railroads and amending the act to regulate commerce in certain particulars (hereinafter called "new act") affects the issues in this case only as follows:

In the matter of export bills:

1. The act divides the carriage of foreign commerce by water carriage into two classes; one by carriage in vessels registered under the laws of the United States; the other in foreign vessels not so registered.

(*a*) As to the first class, the act expressly confers upon the Commission the power to formulate the bill of lading; it also terminates the rail carrier's liability after delivery to the vessel, and provides that the issuance of a through bill shall not be held to constitute an arrangement for continuous carriage or shipment.

(*b*) The new act says nothing as to the bills of lading in foreign commerce by rail in connection with foreign vessels not registered in the United States.

If there had been no preceding laws on this subject it would carry an implication that this movement in foreign bottoms was excluded. As, however, the existing statutes vested jurisdiction in the Commission which covered this second class of movement, the effect of the new act is to leave this class unaffected, and to be governed by the statutes previously enacted, and to regard the new act as a variance for the benefit of registered vessels to promote an American merchant marine. Any other ruling would be to the benefit of foreign ships.

(*c*) While, therefore, the act will require a new bill of lading to govern class 1, it does not affect the question raised by this case as to class 2, except to emphasize the fact that Congress could not have intended to relieve rail carriers using foreign bottoms from the regulation of the Commission as to the bills of lading they could issue and their liability thereunder.

This power is dependent on the construction this court will give to the sections of the act to regulate commerce as existing when the new act was approved, since these provisions are repeated without change in the new act.

As to domestic bills:

The only provision of the act affecting the issues is:

(*a*) The provision that the liability of the initial carrier and carrier by water where the carriage is partly or wholly by water, for loss to property, in custody of the carrier by water, is regulated by the laws and regulations governing water transportation requires the domestic bill to so provide.

(*b*) The remaining questions are not affected.

The necessity of deciding whether the Commission has the power set forth in question first above is the same, as the new act repeats the language of the then existing statute as to such power.

The controversy between carriers and shippers wherein the shippers contend that certain clauses of the uniform bill of lading adopted by the carriers under the direction of the commerce act, requiring them to adopt reasonable regulations

and practices as to the form and substance of bills of lading, are unjust, unreasonable, or illegal, and the opposing contention of the carriers, denying such charges and also contending that the Commission has no jurisdiction, if so deciding, to prescribe what are just, reasonable, and legal provisions and direct such provisions to be maintained, is unaffected by the new act and presses for decision.

Except as to the liability for loss while property is in the hands of a carrier by water the other questions remain the same.

They are conceded to be unaffected by the new act. (See Appellee's brief on effect, of Oct. 7, 1920, p. 9.)

As the question of power to prescribe the export bill used in connection with foreign vessels not having American registry remains, as well as of power over domestic bills, it is submitted that the Court should decide the case on the general power of the Commission presented in this cause, affirming, that as to export bills covering shipments on American registered vessels the statute now confers full power to regulate these, and reversing the case as to them. If the Court should not sustain the power to prescribe as to other bills in the particulars in issue before the Commission, as contended for by the Commission, the judgment should be affirmed, but with a saving of the power of the Commission to regulate said bills of lading on export shipments in American bottoms. If the power is sustained, then the judgment should be reversed.

A fuller discussion of these questions follows:

in, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier.

The fifth paragraph provides that:

(5) The issuance of a through bill of lading covering shipments provided for herein shall not be held to constitute "an arrangement for continuous carriage or shipment" within the meaning of this act.

It will be observed that the provisions of this section is a plan which will aid, as well as regulate, water carriers of foreign commerce "whose vessels are registered under the laws of the United States." Foreign vessels, *not so registered*, are not included in or regulated by section 25.

The provisions of this section contain two distinct regulations of export bills of lading to be issued thereunder: (1) It is required that such bill of lading shall "name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge;" and (2) it provides that the Commission shall make "such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading." Certain duties are then imposed upon the carrier by rail and certain limitations upon such carrier's liability are stated.

Putting aside for the present the question of the right of rail carriers to initiate bills of lading to foreign ports for traffic to be carried by ships not registered under the laws of the United States, it is evident that the export bill, authorized by the order of the Commission in the case before this court, must now be changed to meet the specific requirements of the new law. The requirement that the rates and charges of each carrier—rail and water—shall be stated separately, including port charges not included in their line rate, is possible when taken in connection with the filing of schedules, and answers to inquiries, called for in other paragraphs of the section. It is a complete plan, affecting water carriers of a particular class, and the formulation of the bill of lading by the Commission is a part or incident of the plan. It is clear that the act confers jurisdiction upon the

Commission to *prescribe* the form of such a bill of lading; it is not to be initiated by the carriers. The carriers may, and probably will, be heard by the Commission regarding the form of this export bill, as has heretofore been done in prescribing forms of reports, accounting, bookkeeping, etc., which the Commission is required to initiate. But the power of initiation of the form of this particular bill of lading is, as we understand it, wholly with the Commission under the present law.

That power may be delegated to the Commission to prescribe forms to be used by carriers subject to the act, in transacting carrier business, has been fully sustained by this court. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423.

This enactment by Congress settles the question of the jurisdiction of the Commission over the form of the bill of lading to be issued by rail carriers transporting foreign commerce, in connection with vessels registered under the laws of the United States.

II.

EXPORT BILL OF LADING TO BE USED BY RAIL CARRIERS AND VESSELS OF FOREIGN REGISTER.

It follows that the form of an export bill of lading to be used by rail carriers, where the traffic moves from a port of the United States to a foreign port, now before the court in this case, will have to be

changed by limiting it to vessels not registered under the laws of the United States. Some other changes in the form will be necessary, in view of other provisions of the new law hereinafter noted. This bill of lading, like the domestic bill, hereinafter discussed, is initiated by the carrier, the same as rates, charges, regulations and practices are initiated by the carrier. The jurisdiction of the Commission to hear complaints regarding specific provisions in the bill, thus initiated, and to determine whether such provisions are unreasonable or unlawful, is still before the court for decision on this appeal. The fact that changes will have to be made in the export bill, by reason of the new legislation, does not make the fundamental issue a moot question. As to this class of export bills of lading the jurisdiction of the Commission rests upon the general provisions of the interstate commerce act and will be discussed after reference to changes in the domestic bill of lading.

III.

DOMESTIC BILL OF LADING.

Section 438 of the act terminating Federal control amends section 20 of the interstate commerce act as follows:

> *Provided further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months,

> and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

Sec. 437 further amends section 20 of the interstate commerce act by inserting the following proviso:

> *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water.

These amendments will necessitate some changes in the domestic bill prescribed by the order of the Commission now pending in this case. But these amendments to the act do not change or affect in any manner the question of the jurisdiction of the Commission. Domestic bills, like rates, regulations, and practices, are still to be initiated by the carrier, the jurisdiction of the Commission over the subject matter, and the form of the bill, being the same as the power to hear complaints and determine whether the rates, regulations, and practices are reasonable.

IV.

JURISDICTION OF THE COMMISSION.

The Congress was advised of the pendency of this suit by Mr. Commissioner Clark at the hearing of the bill terminating Federal control. (Mr. Commissioner Clark, Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, July 15–22, 1919, pt. 1, p. 138.) The powers exercised by the Commission under the general provisions of section 15 of the act to hear and determine complaints regarding specific clauses and provisions in the bill of lading in use and proposed by the carriers was thus made known to the Congress. With this knowledge the committee recommended and the Congress reenacted, with slight amendments (not affecting the question here involved), the provisions in section 1 of the interstate commerce act. In so far as it affects bills of lading the amended paragraph of section 1 reads as follows:

> (6) It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable * * * regulations and practices affecting * * * the issuance, form, and substance of tickets, receipts, and bills of lading, * * *.

Section 15 was also amended and reenacted. The powers exercised by the Commission in this case were reenacted and read as follows:

> (1) That whenever, after full hearing, upon complaint made as provided in section 13 of

> this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any regulation or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what * * * regulation or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 12 of the interstate commerce act requiring the Commission "to execute and enforce the provisions of the act" was not changed except to number the paragraphs.

The Commission having construed the act as giving to it full power to review provisions in bills of lading in use by carriers subject to the act and to eliminate unjust, unreasonable, and unlawful clauses, and the knowledge of this administrative ruling having been brought to the attention of Congress, the reenact-

ment of the law carries with it the construction thus given it by the Commission.

> We are not without the aid of a construction placed on acts similar to this by the other departments of the Government. We are aware that such construction is not conclusive but when the legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier. *State* v. *Moore*, 15 Nebr. 88; 69 N. W. 373, 378.

While the decision of the District Court in this case, by a majority of the judges, was brought to the attention of the Committee as stated in appellees' brief, the denial of its correctness and the proceedings to review the same were also stated. The Committee had actual notice of the administrative ruling by the Commission. Had the committee or Congress intended to limit the construction of the power claimed by the Commission they would doubtless have done so in express terms. Their repetition of the language, which the Commission had construed as conferring jurisdiction upon it, infers their agreement with the Commission that it was all-sufficient. As to the effect of departmental construction where a statute has been reenacted see *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401–2; *United States* v.

Falk, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos Y Compania*, 209 U. S. 337, 339; *Copper Queen Consol. Min. Co.* v. *Arizona*, 206 U. S. 474, 479.

We do not claim that under the law as it then stood and now stands the Commission has power to *initiate* bills of lading, excepting the through export bill to be used by rail carriers in connection with vessels registered under the laws of the United States. Our position is that the Congress, having again declared that all regulations regarding the issuance, form, and substance of bills of lading shall be just and reasonable, and that all unjust and unreasonable regulations regarding the same shall be unlawful, and having charged the Commission with the duty of enforcing all the provisions of the act, and expressly providing that if any such regulations or practices are found to be unjust or unreasonable, the Commission shall prescribe what will be just and reasonable regulations and practices to be thereafter followed, the jurisdiction of the Commission to hear and determine complaints regarding regulations in the form, substance, and in the issuance of bills of lading initiated by the carriers, is clear beyond question. With such jurisdiction the Commission had the power, and were expressly required by the act, if they found any regulations in the bills of lading under consideration in this proceeding unjust or unreasonable, to order such provisions eliminated and to prescribe just and reasonable regulations,

regarding the subjects covered, to be thereafter adopted and followed by the carriers.

It will also be observed that the interstate commerce act as amended confers broad powers upon the Commission as to all matters affecting the receipt, handling, transporting and delivery of traffic, and the charges therefor which the law requires to be just and reasonable. These powers are covered by the general jurisdictional clauses of the act set forth in sections 12, 13, 14, and 15.

Where the private side of the carriers' business is affected, or where there is some special scheme or plan prescribed by the law—as in the new section 25—express authority has been conferred upon the Commission. But the general jurisdiction and powers of the Commission cover all proceedings and orders pertaining to the enforcement of just and reasonable action by the carrier in the performance of his public duties. There is nothing in the act which defines what shall be held to be due or undue, unjust or unreasonable. "Such questions are questions, not of law, but of fact." *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 219. "So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts." *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196. "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation

by the body created for that purpose." *Minnesota Rate Cases*, 230 U. S. 352.

The duty imposed upon the Commission to administer and enforce the act to regulate commerce, carries with it powers of regulation, which are not specifically or expressly stated in the act as, for instance, the tariff regulations in which perishable freight shall be precooled and preiced for shipment and the charges therefor (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199); to determine the reasonableness of demurrage rules (*Proctor & Gamble Co.* v. *United States*, 225 U. S. 282); to fix the divisions of through rates with tap lines to prevent rebating (*Tap Line Case*, 234 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457); to determine rights to switching privileges (*Penna. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R.* v. *United States*, 238 U. S. 1); to regulate the distribution of coal cars (*Int. Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452); to construe tariffs and determine the duties and obligations of the carriers thereunder (*Texas & P. Ry. Co.* v. *American Tire Co.*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43).

In all questions arising under the act regarding the duties required of common carriers by the act the determination by the Commission is primary and exclusive. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna.*

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The regulations affecting the issuance, form, and substance of domestic bills of lading and export bills covering transportation by water by foreign carriers not registered under the laws of the United States are required by the act to be just and reasonable and if they are in any particulars unjust or unreasonable they are unlawful. This presents questions of fact which are cognizable under the general jurisdiction of the Commission. These administrative questions are to be settled by the administrative tribunal charged by law with the enforcement of the act. *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *Texas & P. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138.

The enormous quantities of bills of lading required daily in this country make the present situation embarrassing to shippers and carriers. The supplies of the old bills have run out and, while the question as to the forms of the new bills remains uncertain, the carriers and shippers do not want to incur the expense of printing large quantities of the old forms. It is very important and vital that this question, regarding the jurisdiction of the Commission, should be settled by this court. We therefore submit that

while the present forms covered by the orders in controversy in this suit will have to be changed in some particulars to meet the requirements of the new law, the jurisdictional question, upon which the case was decided in the court below, should now be determined by this court. This is not a moot question. The decision below denied the general power of the Commission. If the case is sent back without a determination of the jurisdiction of the Commission over bills of lading, it will have to be again determined by the Commission and brought again to this court, after months of delay for final action. This will, we submit, continue and increase the embarrassment and confusion already existing among carriers and shippers regarding this subject.

We respectfully ask that the decision of the court below holding that Congress did not "confer upon the Commission the right to prescribe the terms of the carriers' bills of lading" be reversed.

Respectfully submitted.

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APRIL, 1920.

○

No. 541.

OCTOBER TERM, 1919.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

ALASKA STEAMSHIP COMPANY ET ALS., Appellees.

BRIEF FOR CARRIERS (APPELLEES).

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DECEMBER, 1919.

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It is respectfully submitted that the order of the District Court granting the injunction should be affirmed with costs. 59

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Carmack-Cummins Amendments (34 Stat. L. 584, 38 St. L. 1197, 39 St. L. 34)	3, 17, 28, 29, 31, 33, 34, 40
51 Congressional Record, p. 9621	43
Conference Rulings I. C. C. 127	12
Dist. Ct. Jurisdiction Act (38 St. at L. 219, 22 Oct. 1913)	57
Hutchinson on Carriers—Sec. 1361 (3d Ed)	36
Harter Act, 27 St. L. 445	13–22
Commerce Act, Sec. 6	6
Commerce Act, Sec. 12	14
Commerce Act, Sec. 1, Sec. 15	5–23
Pomerane Act 38, 38 St. L. 538	12–13
Revised Statutes, Act of June 10, 1910, 36 St. L. p. 539, Section 4281, 4282, 4283	21

In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 541.

United States of America and Interstate Commerce Commission, Appellants,

vs.

Alaska Steamship Company, et als., *Appellees.*

BRIEF FOR CARRIERS (APPELLEES).

FIRST POINT

The Commission has no authority to draw the carriers' bills of lading.

(*Assignment of Errors I, II, III, IV, VI, VIII.*)

The Petition (IV) alleges:—

> "By existing tariffs the carriers offer to perform carriage under common law liabil-

> ity, unmodified except by applicable statutes or, in the alternative, under liability measured and defined by the bill of lading adopted and issued in 1912 at the recommendation of the Interstate Commerce Commission. Shippers are free to choose either liability. If the shipper chooses the liability measured by the bill of lading, the tariff charge for the transportation is approximately 10 per cent. less."

History of the Present Bill.

The bill of lading alluded to in the petition was originally recommended in the interest of uniformity by an order of the Commission of 1908, In the Matter of Bills of Lading, 14 I. C. C. 346, as appears from the report of the Commission which accompanied the recommendation of 1908. The bill had been drafted after investigation and conference by a joint committee of shippers and carriers, and represented, as the Commission then said, "in most, if not all, of its principal features a virtual agreement between shippers and carriers." Further the Commission said of the bill:—

> "It is, of course, more or less a compromise between opposing interests, because on the one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object, and perhaps not without substantial reason. As we are advised, it is in some

> respects less favorable to the shipper than the local laws or regulations of one or more states, but is more favorable to the shipper than the local laws or regulations of most of the states. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country."

That bill recommended by the Commission was incorporated in the Official and Western Classifications, where it remains with some modifications which followed the enactment of the Carmack and Cummins Amendments. In the alternative, carriage was offered in these classifications at increased rate "under the liability imposed upon common carriers by the common law and the Federal and state statutes applicable thereto." This theory of rate alternative was approved by this Court in Chicago & Alton R. Co. *vs.* Kirby, 225 U. S. 155, a suit for special damages arising out of breach of a contract for expedited transportation. This Court said: "for such a special service and higher responsibility it" (the carrier) "might clearly exact a higher rate."

Clear grant of Power must be shown.

The Commission's order, which is the subject of the present litigation, would require carriage at *higher* than legal liability (under the common and statute law) for the *lower* rate.

The picture is of a bargain between the shippers and carriers. In that bargain the carriers offered to undertake obligations more onerous than the law required in consideration of the relief clauses to which the shippers agreed. There was no thought then (1908) that the Commission could write the contract. An illustration of an important concession made by the carriers in the bill of 1908 and again offered in the proposed carriers' bill in the present case (Tr. page 81) was the clause by which the carriers offered to assume the burden of disproving negligence even as to causes which were excepted, such as riots and strikes, etc. This matter of burden of proof under a bill of lading in interstate commerce is a Federal question which "must be resolved by an application of general principles of the common law:" Railway Co. *vs.* Prescott, 240 U. S. 632. The Commission in writing the contract has struck many important clauses in favor of the carriers but left standing the obligations which the carriers were voluntarily ready to assume in consideration of the reliefs. The result of Commission action is thus one-sided. Indeed, the function of the bill of lading is to express the contract between the shipper and carrier upon which the minds of the parties have met. A Commission, or court, has no place in this office.

No statutory grant to Commission to prescribe bill of lading.

We suggest these underlying considerations as preliminary to the jurisdictional question now to be presented.

The jurisdictional question is how far the substantive duty of the carriers as to Bills of Lading under Section 1 has been, or could be, carried into a grant of correlative power in the Commission. We print in parallel columns the substantive provision of Section 1 and the part of Section 15 as to power on which the Commission relies:

§1—*The Duty.*	§15—*The Commission's Power.*
Railroads are required "to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading" which expression of the carrier duty is then followed by a prohibition as "unlawful" of "every such unjust and unreasonable classification, regulation, and practice."	The Commission is authorized "To determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the

> same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Of this part of Section 15 the opinion of the District Court (Tr., p. 100) says:—

> "All this refers to rates, classifications, regulations and practices. That the Commission has power under Section 12 of the Act to investigate as to the fairness of the carriers' bills of lading we have no doubt, but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part."

"Practice" does not include bills of lading.

Before the amending Act of June 18, 1910 (36 St. at L., 539), the Commission's jurisdiction was (Section 15) of "classifications, regulations, or practices whatsoever * * * *affecting such rates*," and by that act the italicized clause was struck out. This amendment gave the power to the Commission, as to practices, to prescribe, after hearing and upon proper evidence, a "practice"

which "is just, fair, and reasonable." But as the District Court has said (Tr., p. 100) this does not give authority "to draw the carriers' bills of lading either in whole or in part." Before the Act of 18 June, 1910, the practice to be cognizable by the Commission must have affected the rates themselves, and now the practice must have some relationship to the associated matters. In the Matter of Stopping Cars in Transit to Complete Loading, 36 I. C. C. 130, a case decided after the Amendment, the Commission thus expressed (page 132) its jurisdiction conferred by Section 15 as amended in 1910: "'Rate,' 'fare,' and 'charge,' broadly speaking, denote the compensation of the carrier; 'classification,' 'regulation,' and 'practice' are merely incidents of a rate, fare, or charge which serve to determine the amount, availability, or elasticity thereof, or of the value of the whole service rendered."

This court has defined the effect of the amendment of Section 15 of the Act of 1910 in the Tank Car Case (242 U. S., at page 229) thus:—

> "The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a 'practice' within the meaning of Section 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well known

> rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one."

The practice which the Commission may determine is a practice like a classification or regulation, such as would burden transportation or cause discrimination, and like matters. In the bills of lading prescribed by the Commission's order many matters were covered which had no relation to burdening transportation, which could not favor the large shipper and oppress the small one or otherwise be unjust, unfair or unreasonable as "practices" in the connotation of that word in Section 15. Instances of features of the bill of lading as ordered by the Commission which are unrelated to the business of carriage as such and are therefore not practices within the definition of this court are: eliminating the Riots and Strikes clause: discharging liability of consignee for freight money under defined circumstances: and enhancing initial rail and direct water line liability and forcing the carriers to assume by contract higher liability for initial rail and direct water carriage than is provided by the Harter Act and other applicable law.

The jurisdiction of non-carrier facilities.

In G. N. Ry. *vs.* Minnesota, 238 U. S. 340, this Court overruled an order of a State Commission directing a railroad to furnish a track scale and pointed out that the order was arbitrary in seeking to eliminate a discrimination "by peremptorily requiring construction of another" (scale) "without giving opportunity to accomplish the same result through discontinuing the use of those already installed." The jurisdiction of the State Commission did not extend to the control of the non-transportation convenience and was limited to directing that a resultant discrimination, if found, should cease.

Any discrimination resulting from a disregard of the duty created by the 1st section in respect of bills of lading, would be cognizable by the Commission. If anything in the bill of lading was used so as to produce an unlawful discrimination or preference, then the Commission would have jurisdiction after hearing to order that discrimination or preference to cease.

But the Commission (52 I. C. C. 685-686) says:

> "Thus the Commission has power and authority under the act to determine the reasonableness of rules, regulations, and practices of the carriers, and to require them to cease and desist from the enforcement of rules and

> regulations, and the continuance of practices found to be unreasonable or unjustly discriminatory, or unduly prejudicial. And herein lies the Commission's power to lay hands upon the 'issuance, form, and substance' of bills of lading."

Jurisdiction of practices "affecting" substance confers no power to prescribe substance.

Here we have the argument that the word "practices" as occurring in Section 15 relates back to the same word as occurring in Section 1, and the Commission thinks that power from "any practices whatsoever" by reference back to Section 1 expands by inference the Commission's power over practices "affecting" the substance of bills of lading and by a further inference gives power over the substance itself. We think this argument unsound, but in any case it does not go far enough to support the Commission's action here. The Commission's position requires a determination of the meaning of the word "affecting" as used in Section 1 of the Commerce Act. A practice affecting the substance of bills of lading, to which Congress had reference in Section 1 might be the manner in which the terms of the bill of lading should be printed on the document, or posted in the stations, so as to bring them to the notice of shippers. A practice affecting the substance might also be illustrated by the requirement that order-notify bills

should be printed on yellow paper. But the Commission asserts that jurisdiction of practices *affecting the substance* of bills of lading is equivalent to a grant of power over the *substance* of the bill of lading itself. Congress, however, used this word "affecting" advisedly. This appears from the grant to the Commission of (*a*) power over rates and (*b*) by an additional separate grant, power over any "practice affecting any rate"—Paragraph 2 of Section 15. So power over practices affecting the substance of a bill of lading is outside of and not over the substance of the bill of lading itself.

The Commission's view of the scope of its power would include authority to prescribe the liability a carrier must assume to its passengers. Thus the 1st section of the Act required "just and reasonable regulations and practices affecting * * * the issuance, form, and substance of tickets." Ordinarily the ticket includes provisions regarding the liability of the carrier. If the power of the Commission to regulate "any practices whatsoever" includes tickets, it would follow that the Commission has the right to regulate liability in tort to a passenger. This association of tickets with bills of lading in Section 1 of the Commerce Act is another weighty circumstance as indicating that the regulatory Commission created to deal with and prevent discrimina-

tion, preferences, etc., was not intended to have authority over the foreign field of tort which is covered by our system of jury trial as required by the Seventh Amendment. But the Commission itself has rejected tort jurisdiction: Conference Ruling of I. C. C. 127.

Regulation of substance by Congress exclusive.

That Congress did not intend to intrust regulation of the substance of bills of lading is demonstrable also by the fact that Congress itself regulated that substance specifically. Thus in the Cummins Amendment the Congress regulated notice of claim required by bills of lading; and gave the Commission authority to base rates on value in designated cases and has thus definitely indicated the limits of the Commission's authority. And by the Pomerene Act relating to bills of lading (39 St. at L. 538, Act of August 29, 1916) Congress in still further detail regulated the substance of bills of lading. In this Act Congress forbade any provision in an order bill of lading that the bill is non-negotiable unless agreed to by the shipper (Section 3). So, too, by Section 21 the carrier is permitted to insert in the bill of lading the familiar phrase "Shippers' weight, load and count," and is thus allowed to contract that it does not underwrite quantity. The title of the Pomerene Act is "An Act Relating to Bills of Lad-

ing in Interstate and Foreign Commerce," and the first section expresses the intent of Congress "that bills of lading issued by any common carrier for transportation of goods" in interstate or foreign commerce "shall be governed by this Act." The Act also by Section 4 forbids the issue of order bills for continental use in parts or sets, and by Section 8 regulates a practice of delivery of the goods by the carrier. Also the Harter Act regulates (27 St. L. 445, Act Feb. 13, 1893) vessel "bills of lading." This regulation by Congress is by its very terms complete, exclusive and consistent only with the theory that the Commission does not have jurisdiction over the substance or over practices affecting the substance of bills of lading in and of themselves; but always with the limitation in mind that some resultant preference or other illegality could be redressed by the Commission.

The truth is that if Congress had intended to vest in the Commission a power correlative with the obligation in Section 1 as to bills of lading we should have found the grant of power in clear, unmistakable language like that employed in creating the duty. But only the word "practices" occurs in Section 15, without the phrase covering matters affecting the substance of bills of lading. As this Court said in The Tank Car Case, this important power would not have been

"ambushed in obscurity and suddenly disclosed by construction."

For purpose of test, suppose the carriers had issued without alternative of rate a bare receipt for goods to be carried to a named destination comparable to the familiar baggage check (see B. & M. R. R. *vs.* Hooker, 233 U. S. 97), the conditions of carriage would then have been subject to law. Could the Commission have deemed the receipt unreasonable on the ground that it did not increase the carrier's common-law liability? To the extent that heavier than legal liabilities are imposed by the Commission's bill of lading this is in effect what has been done. The Commission has declared legal conditions unreasonable and essayed to change the law by exercise of administrative function.

No power conferred by Section 12.

Section 12 of the Act, giving the Commission power "to execute and enforce the provisions of this Act," is also invoked by the Commission as authority for its action, but (see I. C. *vs.* C., N. O. & T. R., 167 U. S. 479, Harriman *vs.* I. C. C., 211 U. S. 407, and the Tank Car Case, 242 U. S. 208) has been determined not to have the effect of creating a power to enforce a particular duty.

Prescribing bill of lading not an administrative matter.

The argument for the Commission (page 18) disregards the limitation placed upon the word "practices" in Section 15 and in the enforcement provisions of Section 12 by this court in the cases last cited. The brief on this point asserts that a practice includes prescribing the bill of lading as an administrative matter. The brief then (page 18) states the consideration solely of result which is deemed by the Commission controlling in the following language:

> "If the courts may not determine these administrative questions, as this court has clearly held, then the requirements of the act hereafter quoted as to bills of lading must be without any tribunal to enforce them if the Commission does not possess that power."

The argument is one of result only. The result is stressed that if the Commission cannot prescribe substance of bills of lading, then there is no tribunal to enforce the duty in Section 1. But this is a mistake. Any carrier duty created by Section 1, if not committed to the Commission expressly, is enforcible in the common law courts, as was explained by this court in the Tank Car Case (242 U. S. at page 227). There this court said that under the Commerce Act of 1887, and the amendment of 1906, it was the "duty" of the carriers "to furnish the instrumentalities of trans-

portation", and the court added that the question before the court under the amendment of 1906 was whether, as under the original act, "jurisdiction to enforce the duty was at common law in the courts or under the statute and in the Commission."

Indeed the Commission could not be clothed with power to prescribe a new bill of lading, except in accordance with standards set by Congress. If Congress attempted to confer authority to formulate and prescribe a bill of lading without indicating the standard to which the provisions thereof should conform, this would be an unconstitutional delegation of legislative power: O'Neil *vs.* Insurance Co., 166 Pa. 72.

It being necessary, therefore, that Congress furnish the Commission with standards for its guidance in its consideration of the conditions of the bill of lading, it follows that due process requires that the Commission shall apply these standards, after hearing, in the light of evidence, just as the Secretary of War for example, in passing upon the height of bridges which may interfere with commerce, is required to hold hearings and to determine the controversy in accordance with the standards specified in the Act of Congress governing this matter: Union Bridge Co. *vs.* U. S., 204 U. S. 364.

So no provision of the Act authorizes the order.

SECOND POINT.

The Carmack-Cummins Amendments do not repeal the Harter Act and kindred Acts as to water borne traffic in connection with rail.

(*Assignment of Errors IV, VI and IX.*)

What is the effect of the Carmack-Cummins Amendments upon the right of the carrier to avoid, by contractual provisions, a liability which otherwise would exist? And what is their effect on the Harter Act and like legislation?

The original Carmack Amendment (34 Stat. at L. 584) was interpreted as requiring the issue of a receipt or bill of lading and establishing an exclusive federal rule of liability: Adams Express Co. *vs.* Croninger, 226 U. S. 491. The Federal rule (Hart *vs.* R. R., 112 U. S. 131) permitted agreements for less than the actual value. This resulted in the Cummins Amendments (38 Stat. at L. 1196; 39 Stat. at L. 441) which was intended to invalidate agreements by carriers limiting the amount which might be recovered in case of loss or damage for which they might be liable to something less than actual value. In neither Cummins Amendments is there any evidence of intention to alter in any way existing rules with respect to the right of the carrier by contract to modify its common law liability by relieving itself from liability for loss or damage which it *did not cause*. In short,

Congress held throughout these amendments a clear distinction between contracts of the carrier *exempting* itself from liability for certain *causes of loss or damage* and contracts of the carrier *limiting* the amount of recovery to certain specified amounts which might be less than the actual value.

The Cummins Amendment, in denying to the carrier the right to exempt itself from liability for loss, damage or injury *caused* by it, declares by inference that for loss, damage or injury not caused by the carrier, in other words, for loss, damage or injury not attributable to its fault, the carrier is not liable. For a regulation of commerce is as firm in negative as in positive aspect: R. R. *vs.* Winfield, 244 U. S. 147.

Accordingly *the Water Carriage Acts are not repealed.*

The Commission (52 I. C. C. at p. 726) takes the position that "A water carrier under an arrangement with a railroad for common control and continuous carriage or shipment" cannot rely upon the Harter Act, the Fire Act, the Limited Liability Act, because this "would be in contravention of the Cummins amendment, and therefore null and void."

The appellants' brief makes no argument in justification of the Commission striking the water

carriage clauses from the inland bill of lading. Point VIII of appellants' brief headed "The Elimination of Clauses Protecting Water Lines" appears to deal only with the export bill of lading concerning which the carriers have not made so strong a complaint, inasmuch as the water line provisions and others which the carriers consider they have the right to stipulate for as being just and proper were not wholly eliminated. The only reference to elimination of these important provisions from the inland bill appears to be on page 42 of the appellants' brief where it is stated:

> "For this reason the Commission has permitted certain provisions to remain in the export bill limiting the carrier's liability where like provisions are excluded from the domestic bill. The discussion of this question by the Commission is found in its report (pp. 726-740)."

We are not certain whether the appellants by thus omitting to discuss the elimination of the water carriage clauses from the inland bill are content to abide by that part of the District Court's opinion wherein Judge Ward said (Tr. p. 111):

> "In any event, there was no power to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of

> vessel owners and of the Harter Act. These Statutes still survive unless repealed by implication, and this result we are of opinion was neither intended nor accomplished."

Therefore we shall discuss the proposition stated by Judge Ward as if it were contested by the appellants.

Preliminarily it should be noted that the Commission in its report did not particularize in what respects the water carriage provisions stricken from the inland bill of lading were illegal, except that at page 725 of its report it stated: "Many of the exemptions proposed to be incorporated in this section for the benefit of carriers by water would be in direct violation of the provisions of the Cummins Amendment." In its discussion of the export bill at page 736 the Commission says: "We are convinced that many of the stipulations in respect of the water carriers' exemption from liability proposed in their behalf are unreasonable and indefensible, and, in many instances, in violation of the law."

The Commission does not indicate the particular clauses, which are alleged to violate the law. The clauses and provisions contained in the inland bill as proposed by the carriers are the same clauses and provisions carried in their bills of lading for very many years and are in substance the same as those found in the bills

f lading of all ship-owners doing business to r from or between the ports of the United States. Under our law no exemption from liability is ffective unless the carrier is free from negli- ence.

Among the provisions stricken from the inland ill by the outright elimination of Sec. 9 is the eneral average clause equivalent to that which as upheld by this court in The Jason, 225 U. S. 2.

We believe that examination of Sec. 9 as pro- osed by the carriers (See Appendix under eparate cover filed with this brief) will disclose o provision in violation of law.

limination of statutory protection.

By eliminating the customary water clauses rom the bill of lading the Commission has re- uired the carriers to assume by contract liabilities rom which they have long been exempt by Stat- tes. Section 4281 of the Revised Statutes re- eves the shipowner in certain cases from liabil- y for precious metals, jewelry and other valua- les. Section 4282 of the Revised Statutes re- eves the shipowner from liability for dam- ge caused by fire on board unless caused by the esign or neglect of the owner. Section 4283 and ollowing limit the liability of the shipowner o the value of the vessel after the disaster

and her freight then pending. The Harter Act relieves the shipowner who has used due diligence to make the vessel seaworthy from liability for loss resulting from faults or errors in navigation or in the management of the vessel and also for loss arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect in quality or vice of the thing carried or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

These statutes express the policy with respect to shipping inaugurated by Congress in 1851. They have always been availed of by shipowners. Water line bills of lading containing appropriate provisions to give the shipowner the benefit of these acts of Congress have been in universal use, and the bill of lading recommended by the Commission in 1908, 14 I. C. C. 346, provided in Section 9 that the water carrier should have the benefit of the statutory limitations of and exemptions from liability and should also have the benefit of other specified exceptions appropriate to the hazards of water transportation.

But the bill of lading now prescribed by the Commission begins by making the carrier of property **"liable for any loss thereof or damage**

thereto, except as hereinafter provided". In view of the assumption of liability thus enjoined it is apparent that the water carrier under the prescribed bill would by its own waiver be deprived of the benefit of the acts of Congress.

It is well settled that the above named statutes, being for the benefit of the carrier alone, may be waived by it. Language better calculated than Section 1 to effect a waiver could hardly be employed.

D'Utassy *vs.* Mallory S. S. Co., 162 App. Div. 410, 147 N. Y. Supp. 313;
The Hoffmans, 171 Fed. 455, 462-463;
The Satanita [1897] A. C. 59;
Ingram & Royle *vs.* Services Maritimes du Treport, L. R. 1914, 1 K. B. 541, 550-553.

Commerce Act itself preserves water statutes.

Section 15 of the Act to Regulate Commerce, on which mainly the Commission relies for its power, contains the express declaration that **"any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water":** 36 St. L. 552. It is not to be presumed that the statutes governing water carriage were repealed by implication for "Congress would have used language adequate to that purpose," if Congress had "in-

tended" a purpose so "sweeping":—U. S. *vs.* L. & N., 236 U. S. 318, at page 336; and it has been held that the initial carrier has the benefit of the federal statutes when the loss is in the hands of a connecting water carrier. The Hoffmans 171 Fed. 455; Brinson *vs.* Norfolk Southern R. R. Co., 169 N. C. 425; Burke *vs.* Gulf C. & S. F. Ry. Co., 147 N. Y. S. 794.

The Commission's attempt to deprive water carriage of its statutory exemptions would result in imposing an additional burden upon the initial carrier by rail. As initial carrier, it would become liable by virtue of the Carmack-Cummins amendments for losses at sea within the statutory exemptions and limitations. The Courts have held that the initial rail carrier is not liable under the Carmack-Cummins amendments beyond the liability of the water carrier which caused the loss. The liability imposed upon the initial rail carrier by the Carmack-Cummins amendments as determined by the courts is thus increased by the action of the Commission in depriving the water carrier of the benefits of the statutes.

Authorities holding initial rail carriers may avail of water statutes.

In the Hoffmans, *supra,* the National Harvester Company sought to recover from the Railroad Company the value of certain twine lost by fire on one of the Railroad Company's

barges in New York Harbor. The Railroad Company petitioned the District Court for the Southern District of New York to limit its liability to the value of the barge, which petition the Harvester Company contested. The District Judge said, 171 Fed. Rep. 455, 465-466:

> "The Interstate Commerce Act aimed to correct certain abuses in the carriage of goods, principally by land, incidentally by water, but it was certainly not designed to overthrow the long established system of limitation of vessel-owners' liability in connection with water carriage. To suppose so, without any mention of the Act of 1851, would be a perversion of its obvious intent to correct the said abuses. I do not find any merit in the claim."

In Brinson & Cramer *v.* Norfolk Southern R. Co., *supra,* 17 crates of eggs were shipped in January, 1914, from Belhaven, N. C., to New York over the Norfolk Southern Railroad to Norfolk and thence to New York by the steamship Monroe of the Old Dominion Steamship Company. The Monroe with all her cargo was lost at sea by collision. Suit having been brought against the Railroad Company as initial carrier the Supreme Court of North Carolina held that the Railroad Company was entitled to the benefit of any defenses which the water carrier, the Old Dominion Steamship Company, could have availed of. Hoke, J., said (169 N. C. 425, 427):

"And from a perusal of the language of the statute, making the initial carrier responsible for injury caused by it or by any connecting carrier, and from the provision also contained in the amendment for recoupment by the initial carrier or any other or connecting carrier actually causing the loss, etc., we concur in the view of well considered cases on the subject that, although the initial carrier may be by rail, if any connecting company along the designated or usual route of shipment, there being no route designated, is a carrier by water, and the loss or injury occurs by the wrong of such company, the initial carrier may avail itself of the federal legislation applicable to transportation companies of that character, limiting the *quantum* of recovery in certain instances, and at times relieving of responsibility altogether; the principle being that, in cases coming within the effects of the law, the initial carrier, so far as the shipper is concerned, is held to have contracted for through transportation, and is liable for the default of itself or any connecting carrier, and may avail itself of any defenses or of limitations of liability open to the carrier causing the loss."

To the same effect is Burke *vs.* Gulf C. & S. F. R. Co., *supra*, where 31 bales of cotton were delivered to the Railroad Company at Cleburne, Texas, to be transported to Galveston and thence to be transported to New York by the Mallory Steamship Company. At New York the cotton was damaged by a fire on one of the Steamship

Company's lighters. Action having been brought against the Railroad as initial carrier the Court said 147 N. Y. Supp. 794, 799:

> "A loss occurring without the design or neglect of the carrier cannot in any sense be said to have been caused by such carrier, and for this reason a loss caused by a fire on a vessel of a connecting carrier without its design or neglect by which it is relieved of liability by the provisions of sections 4282 and 4289 of the United States Revised Statutes, cannot be said to be a loss for which the initial carrier is liable. These sections are available as a defense to the water carrier notwithstanding the carriage may be under a through bill of lading. * * * Being available to the connecting carrier, which is the agent of the initial carrier, they are also available to the latter."

The same principle is stated in Riverside Mills *vs.* Atlantic Coast Line R. Co., 168 Fed. Rep. 987, also 168 Fed. Rep. 990, (affirmed by this Court 219 U. S. 186), where the Railroad Company was sued as initial carrier for the loss of goods shipped from Augusta, Georgia, to the Pacific Coast. Answering the contention that the carrier was deprived of due process of law by being held for the loss of goods on another line, Judge Speer said, 168 Fed. Rep. 989:

> "He can make any proper defense, which may be made in a court of law, and which any other connecting carrier might make,

wherever the goods are transported, or wherever the loss or injury occurred. If the loss occurred from the act of God or from the country's enemies, for instance, on a section of these intercommunicating lines somewhere between here and the point of destination, or was otherwise capable of defense, this railroad would have the privilege of making such defense here."

Mistaken theory of dissenting opinion in District Court.

As for repeal of these laws by the Carmack-Cummins Amendments perhaps the position of the Commission has nowhere been put more bluntly than in this extract from the dissenting opinion in the District Court—

"The final question is the elimination of the customary clauses which protect the water lines on the theory that the Carmack and Cummins amendments override the Harter Act and those other acts specifically affecting shipping. So far as concerns the statute limiting the liability of ship owners, it seems unnecessary to hold that the amendments have this effect. They only provide that the carriers may not exempt themselves from their duties by contract. While the carrier remains liable notwithstanding that contract, the extent of his liability is still subject to the provisions of all other positive law. It is true, of course, that the result may be that the initial carrier is liable generally and has only a limited recourse over against the water carrier. If this be an injustice, it is one which arises from the liability statute and not from the Carmack and Cummins amendments.

> "As to the Harter Act, however, I can see no escape from the conclusion that there is a conflict between it and the amendments, in which the earlier statute must yield."

But in the Harriman Case (227 U. S. 657) this Court said of the Carmack amendment:

> "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

And the Cummins amendments merely added a liability "for the full actual loss, damage, or injury to such property caused by it or by any" connecting carrier "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value." Now as under the Carmack amendment the carrier may avoid by contract liability for any damage *not caused by it.*

The dissenting opinion in the District Court declared that the statute limiting the owner's stake to the value of his vessel (or salvage) was not repealed, and said:

> "It is true, of course, that the result may be that the initial" (rail) "carrier is liable generally and has only a limited recourse over against the water carrier."

This theory of the dissenting opinion would have the result that Congress, in enacting by the Carmack-Cummins Amendments that the initial carrier held liable for a loss on connecting water line should have a right of recovery over against the connecting carrier, was as to the Limited Liability Statute doing a vain thing. According to the dissenting opinion an initial rail carrier would be held liable without right of recovery over against the water carrier for a total loss of vessel and cargo. By this construction the water carrier sued by the shipper could defend on the Limited Liability Statute and the initial rail carrier could not defend upon that statute. The Carmack-Cummins Amendments would thus be given the effect of repealing the Limited Liability Statute as to the initial rail carrier and leaving that statute in effect as to the water carrier. Congress would not have dealt so disingenously with the subject if repeal of the sea carriage laws had been intended. A simple three line statute referring to those laws and repealing them would have been passed. The truth is that Congress was not dealing with water liability as such at all in enacting the Carmack-Cummins amendments. And so far as water liability has been dealt with at all, it is provided in Section 15 that transpor-

tation by water is "subject to the laws and regulations applicable to transportation by water"—36 Stat. L. 552. All the authorities are opposed to the position taken in the dissenting opinion.

Differing circumstances of water lines require preservation of their exemptions.

The dissenting district judge was impressed with considerations *ab inconvenienti* and phrased the point thus in his opinion:

> "Moreover, if one considers the effect of the interpretation which the petitioners desire, its meaning is much reinforced, for the Act and its amendments were an elaborate effort to produce a comprehensive and equitable regulation of transportation, both by land and by land and water, and it can hardly be supposed that provisions like the Carmack and Cummins Amendments were intended to subject railroads to one kind of obligation and the connecting water carriers to another. At least, no valid reason suggests itself for such a distinction when all had been free before those amendments to protect themselves in exactly the same way."

The fact is that the water-borne part of the traffic was always subject to water law. Congress had differentiated between the water and the rail part of the joint haul in respect of liability. In making this distinction Congress was following out its policy since 1851 and was recognizing the

different circumstances of land and water-borne traffic. The dissenting Judge's suggestion that Congress did not intend "to subject railroads to one kind of obligation and connecting water carriers to another" fails to recognize the perils of the sea and other circumstances and conditions which differentiate the water-borne from the rail part of the haul. From these circumstances and conditions arose the laws stating the rights of ship-owners and giving them now time-honored exemptions which they are entitled to preserve by contract—or certainly are entitled not to be compelled to contract away.

Indeed, the unfairnesses which would arise if this water traffic carried in connection with rail is subjected to insurance liability of the land carriers appear strikingly if we remember that the water carriers which will be deprived of the protection of the Harter Act and similar legislation will be those which voluntarily or by order of the Interstate Commerce Commission have united in offering to the shipping public the additional facility of regular service under fixed joint water and rail rates filed with the Interstate Commerce Commission. Railroad owned ships would also be affected. The water carriers not so operating will still have the protection of the Harter Act and similar legislation. The effect of the dissenting Judge's theory of repeal of this great group

of important laws would be to penalize those water carriers which have joined or been required to join with rail carriers in through routes and rates—to penalize the offering to the public of this greater convenience.

At this time, when ship effort is vital to the country and the necessity of developing our merchant marine is recognized on every hand, the suggestion that an important part of our marine service should be placed at a serious legal disadvantage and the operating cost of that service largely increased must find clearer support in law than mere inference or construction.

THIRD POINT

The Carmack-Cummins Amendments do not preclude a provision by which the value at place and time of shipment measures a loss.

The problem is to find value. Value is not a mere abstraction, and, like other finite things, must be ascertained as of a given time, place and person. To prescribe a rule to ascertain this value the carriers propose (Transcript, page 49) a clause in Section 2 (as 3) as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at the place and time of shipment under

> this bill of lading, including the freight charges, if paid; and where the actual value of the property has not been required to be specifically stated by the shipper in this bill of lading, such actual value shall be arrived at from the bona fide invoice price, if any, to the consignee."

The Commission contrasted this proposed clause with the Cummins Amendments (Act of 4 Mar. 1915, 38 Stat. at L. 1196 and Act of 9 Aug. 1916, 39 Stat. at L. 441) which declare that the carriers shall be liable

> "for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered * * *, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

And then found as matter of law that the Cummins Amendments are in conflict with the ascertainment of value at origin.

The Commission after referring to McCaull-Dinsmore Co. *vs.* Railway, 252 Fed. 664, says (52 I. C. C., at page 711):

"The proposed" (origin value) "rule, being superfluous so far as concerns the transportation of property shipped under rates dependent upon declared or agreed values, and unlawful and void in respect of all other property, we condemn it and direct its complete elimination from the proposed bill."

Destination value not exclusive at common law.

This is merely a statement of the conclusion that there is conflict between the origin value clause and the Cummins Amendment of Section 20 of the Act to Regulate Commerce. In order to see the reasoning upon which the conclusion rests we must look to the McCaull-Dinsmore decision. The court in that case states that "the foundation of the common-law rule" is destination value, and the Circuit Court of Apeals in affirming the judgment made the same mistake of taking an application of the rule for the rule itself.

The brief for the Commission (page 37) falls into the same error in asserting that "the common law rule was and is that in case of such loss the damages are to be measured by the value of the property at the point of destination."

No party to the contract of affreightment can at the common law recover more than his damage. If the consignor is vendor of the shipment be could recover the origin value because this is what he

lost. The argument in the Commission's brief first assumes the incorrect major premise that the common law excludes every value as a basis of recovery except destination value and then proceeds to the incorrect conclusion that destination value —asserted to be the *only* value—is limited by the origin value clause in contravention of the Cummins amendments.

But this it not the law. Like the rule of damage in all actions of assumpsit the common law rule of damages for loss or injury to goods under carriage is to make the injured party whole, excluding speculative, special or nonexpectable damages. In Section 1261 of Hutchinson on Carriers (3d Ed.) the statement is made that this destination rule of damage "is by no means an inflexible rule." Hutchinson points out that destination value is proper "when the owner of the goods himself is to take them at their destination, there to use or to sell them on his own account." But he adds that if the goods have been consigned to another "who is to take them at a price which the owner has fixed upon them * * * the owner could recover as damages for their loss no more than the price which he had himself fixed upon them, with interest"—in other words, the origin value.

A leading case which applies the general rule of making the injured party whole is Magnin *vs.*

Dinsmore, 62 N. Y. 35. In that case the court said (page 45):

> "Though a rule is sometimes stated thus: That the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery; that rule is but a branch of the more general one, that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract."

Value at destination is usually arrived at by taking the price actually paid at origin for the goods, plus freight. Other elements, such as overhead of the consignee, loss of profits during delay and other speculative, nonexpectable elements of actual damage have been excluded.

Justification for origin value rule.

The practical considerations give support to the origin value rule.

First.—Discrimination. For the same commodity, moving on the same date between the same points, a different amount will be paid if the commodity is lost. Two shipments of coal move from the mine to the same point of destination;—one to "A" who has incurred a broker's commision, and the other to "B," who has been more forehanded and avoided this cost of distribution. The mine price to both was the same.

"A" would be paid the cost of the coal, plus the commission, and "B" will be paid the cost of the coal without the commission. There is also the familiar case of double commissions on the same sale where the first shipment is lost.

Second.—The carriers would in destination value be called upon to pay speculative elements of cost of distribution, such as overhead, increased value while rolling, &c. The factors are much disputed.

The instance given in the brief for the Commission (page 38) of a car of grain which went astray and was substituted by another car purchased in destination market is an illustration of one of the mischiefs of selecting destination value as the measure of carrier liability. The carrier was required to pay an element of value which had no existence at the time the contract of affreightment was entered into because (brief of Commission, page 38) "the price of grain" had "advanced." Such a speculative element while rolling had nothing to do with the limitation of true or actual value which the Cummins amendment was enacted to enforce.

The Commission itself deems the origin value rule a reasonable one because it has approved that basis for the inland part of the ex-

port bill. But, deeming the matter foreclosed as to interstate commerce and commerce to adjacent countries by the Carmack-Cummins Amendments, the Commission has refused to exercise its administrative authority which, if the Commission deemed itself to possess that authority in this connection, would evidently have been exercised in favor of the origin value basis. This was a mistake of law by the Commission which should be enjoined as in cases like L. & N. R. R. Co. *vs.* Behlmer, 175 U. S. 648.

In Shaffer *vs.* Railway, 21 I. C. C. 8, the Commission said:

> "This contract makes no attempt to exempt the carrier from liability for the full value of the commodity transported, nor does it in any way limit the carrier's liability to a sum less than the value of the commodity. It is merely a contract between the parties fixing the time, place, and manner of arriving at the value of the property."

The State courts prior to the passage of the Carmack amendment have enforced clauses fixing origin value in bills of lading as against the argument that their effect was a forbidden limitation of the carrier's common law liability. In Rogan *vs.* Wabash Ry., 51 Mo. App. 665, the court characterizes such a clause as an agreement "liquidating the damages in case of loss

or injury" which will be upheld: In Shaffer *vs.* C. R. I. & P. Ry. 185 Ill. App. 615, the court followed the rule the Interstate Commerce Commission had announced and held that such a contract does not limit liability for the full value.

The same considerations led the Commission to approve the origin value rule in a tariff in the report on the Cummins Amendment, 33 I. C. C. 682, see page 693.

A late case is Springfield Light, Heat & Power Co. *vs.* N. & W. Ry. Co., decided by Judge Hollister June 11th, 1919, in the District Court of Ohio, 260 Fed. 254. There coal had been taken for fuel by a railway. The commodity coal tariff provided that the amount of any loss or damage for which any carrier shall be liable shall be computed on the basis of the value of the property at the time and place of shipment. The case was argued upon the Carmack-Cummins Amendments and the court held that the statute did not invalidate the tariff. The Court said:

> "This demurrer will be overruled also, for the reason that the published terms of defendant's coal tariffs in effect at the time, filed with the Interstate Commerce Commission and published according to law, fix the measure of damage for loss or damage on the basis of the value of the property at the place and time of shipment. Of course, the tariff rates are measured by the value of the service. The published rate is on the basis of the value

> of the coal at the mine. A greater value than that would call for a higher rate than the published rate. To permit the plaintiff to recover for a greater value than at the mine, while paying the same rate as other shippers, would be a discrimination in favor of the plaintiff."

Only one value.

The inhibition of the Cummins Amendments is "as to value." The word, as appears from the context of the statute, is used as synonymous with "the full, actual loss, damage or injury to such property". Note the use of the definite article to designate the particular loss in each case. Not *any* or *every* loss, but *the* loss can not be limited. Congress had in mind that each case would present the same problem. Congress was not contemplating that the same loss might present several differing values according to the angles from which the claim was viewed. The consignor's loss would be ascertained by his invoice; the consignee's might include elements of cost in distribution at destination, loss on a resale, &c. But Congress said that *the* loss must be paid and could not be limited. Congress did not say that the highest loss to any person interested in the transaction should be ascertained and paid.

The actual value and the consequent recovery can not be limited. The contract to limit value or to limit recovery of that value would be void. In

either form the statute forbids this element of the contract. Now the value at the time the carrier receives the article for transportation, is a true value, and hence the origin value clause expresses and does not limit the value. The value at time and place of shipment does in fact express all of the loss in contemplation of the parties when the contract of affreightment is made.

There are in the Cummins Amendments evidences that Congress was thinking of value as origin value. In that part of the last Cummins Amendment which authorized the Commission by order to establish rates dependent upon value the expression of the statute is "the value declared in writing by *the shipper,*" etc. It seems justifiable to say that Congress used the word "value" throughout this statute to express the same idea. The sentence quoted from the rate part of the statute is suggestive that the shippers' (or origin) value is a true value. Only by adhering to origin value will the mischiefs of discrimination, such as were condemned in Kirby's case, 225 U. S. 155, and the difficulties, graver from the carrier viewpoint, of determining the true factors of a loss, be avoided.

The legislative history of the Cummins amendment discloses the purpose to have been quite apart from the question of origin *versus*

destination value. The Carmack amendment had been construed to uproot, as to interstate commerce, State common law or statutes which forbade limitation of recovery "to a certain sum which may be named in the bill of lading": (Senator Cummins in charge of the bill,—51 Cong. Rec. 9621; See also Senate Report 407, 62nd Congress 2nd Session Calendar No. 346). And the Cummins amendment was intended "to restore to the shippers of this country not all, but a measure, of the rights which they possessed and which they exercised prior to the passage of the Carmack amendment"; same reference. "These statements of the author of the Act cannot * * * control its construction * * * but they * * * serve to indicate the probable intention of Congress in the passage of the Act"; Jennison *vs.* Kirk, 98 U. S. 453.

So this is all Congress was doing as to value—forbidding the naming of an arbitrary sum certain, unrelated to value. Congress intended to restore the same legal status as before—a status which recognized the validity of a provision to agree upon origin as the settlement value.

FOURTH POINT

Even if the Commission's order was not *ultra vires*, nevertheless, as the bill of lading contracts prescribed are not severable, the injunction was properly granted because of illegality of the Commission's order in various particulars.

The Commission has itself recognized and defined in its opinion in the case at bar the limits of its powers (52 I. C. C. at p. 685):

> "Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

Also as to a matter upon which the Commission has administrative authority this can only be exercised upon evidence and after hearing: The Fairchild Case, 224 U. S. 510: The Florida East Coast Case, 234 U. S. 167. "The mere declaration of a commission is not conclusive": G. N. Ry. *vs.* Minnesota, 238 U. S. 340. So the assertions in the Commission's answer (Tr., pp. 95-96)

that the findings were based on evidence will not prevail against the statements in the Commission's report (exhibited with the bill and also with the answer) to the effect that there is no evidence. The Commission's brief (page 24) refers to the denial of "each allegation in the petition that there was no evidence to support the findings and order and alleges affirmatively that there was evidence to support the same," but this is, as this court has said, the mere declaration of a commission which is not conclusive. The declaration is a conclusion of law which is valueless standing alone: and, in any event, cannot be given effect as against the Commission's own statements in the exhibited report of the Commission to the effect that these matters were "not in issue" or equivalent phrases.

Moreover, this court has approved as a "most commendable practice" the omission from the record of the hundreds of pages of testimony before the Commission, and reliance on the Commission's own findings of fact. (L. & N. R. Co. *vs.* U. S., 238 U. S. 1, 10.) By virtue of this practice the court is "in a position to consider the sharp cut issue as to whether, as a matter of law, the Commission's findings of fact sustain its order" (*ibid,* p. 11). In the case at bar the Commission in its Official Report stated that there was no evidence on certain points: (Tr. pp. 43, 45).

The Commission's order was properly enjoined because:—

A. Without evidence and in excess of liability imposed by the law the Commission erred in forcing the carrier to assume liability during free time and after delivery on private siding.

(*Assignment of Errors VI* (c).)

The domestic and export bills of lading ordered by the Commission will require the carriers to assume carrier liability during free time instead of until 48 hours after notice of arrival and placement. The Commission's order in respect of this feature of the bill of lading is without supporting evidence and would add liability in excess of that imposed by law. The controlling considerations in determining the length of free time are various but all relate to the matter of returning the equipment into the public service. Free time is the *maximum* time after which the consignee, is in respect of the service due to the whole public, a wrongdoer, penalized by the demurrage charges to require him to discharge the lading. Free time is merely the utmost limit of time for discharge of the car. The discharge should be and usually is accomplished in less than free time.

The lapse of a reasonable time for the removal of goods determines the time of change from carrier to warehouseman.

The Commission's order also strikes from the domestic and export bills of lading the provision which terminates liability when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains.

The considerations which the Commission presented for these alterations in the carriers' bill of lading will be found in the Commission's report as printed in the Transcript at pages 35 to 45, and at pages 52 to 57. These considerations were of law, not of fact. And yet we find in the brief for the Commission at page 31 the assertion that "what is a reasonable time in a given case is a question of fact and not a question of law." We need only contrast with this argument the conclusive statement of the Commission itself in its report (52 I. C. C. at page 703) found in the transcript at page 43, as follows:

> "No substantial evidence was introduced by the parties bearing upon this issue."

It is a question of law under the decided cases to determine a reasonable time for the continuance of the carriers' liability: The Titania, 131 Fed. 229 (C. C. A., 2nd Circ.).

B. The Commission erred in eliminating the Strikes and Riots clause.

(*Assignment of Error VI* (c).)

Although the Commission stated that the clause in existing bills which relieves the carrier from loss, damage or delay on account of strikes or riots "is not brought in issue" (52 I. C. C. 705), that is, was not the subject of evidence and controversy, nevertheless the Commission strikes out this clause *as to loss and damage* from the domestic bill, leaving the clause effective only as to *delay*. The clause (Section 1 of the Commission's export bill, Transcript page 84) providing that the carrier shall not be liable for loss, damage or delay resulting "from riots or strikes" was retained by the Commission in the inland part of its prescibed export bill of lading, without doubt upon the theory that the clause was unassailable from the angle of reasonableness in the export bill, which is unaffected by the Cummins Amendments. The Carmack-Cummins Amendments did not forbid contracting out of liability unless "caused by" the carrier. The clause which would be struck from the bills by the Commission's order does not relieve the carrier of liability from any loss or damage which the carrier causes.

The Commission's brief (pages 27-28) cites Railway *vs.* Wallace, 223 U. S. 481, and Railroad

vs. Collins, 249 U. S. 186. These cases dealt only with the question of burden of proof—a question of general law—in a suit against the initial carrier upon the Carmack-Cummins amendments. The question resolved against the carrier in the Wallace case was thus stated by the court:

> "The Company denied liability on the ground that under the contract expressed in the bills of lading, it's obligation and liability ceased when it duly and safely delivered the goods to the next carrier."

Hence the conclusion drawn (page 28) in the brief for the Commission, that "the Cummins amendment * * * prohibits any restriction of common law liability by stipulation or agreement in the receipt or bill of lading," finds no support in the two decisions on burden of proof.

The common law made the carrier an insurer unless he had exempted himself by a lawful term of his contract. The exceptions to the insurer duty were the act of God or the public enemy. Then in addition there was as a part of the common law the right of the carrier to exempt himself by reasonable contract provisions from all non-negligent losses.

The Carmack amendment recognized this breadth of the common law and was therefore construed in a great group of cases by this court to permit these reasonable and lawful exemption

contracts. In the Harriman Case (227 U. S. 657) this court said of the Carmack amendment:

> "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

The Cummins amendments continued the controlling phrase "caused by it or by any" connecting carrier and left the carriers still with the common law power to contract out. The inhibition in the Cummins amendment was the same as the Carmack amendment in forbidding the inital carrier to contract out of liability for loss caused by a connecting carrier. The Cummins amendments also forbade "any limitation of liability or limitation of recovery or representation or agreement *as to value*"—a prohibition aimed only at false or unfair agreements to limit recovery to a sum less than value in the bill of lading and not substantive in any other particular.

Strikes and riots clause not questioned before Commission.

The strikes and riots clause in the current bill of lading reads as follows:

> "Except in case of negligence of the carrier or party in possession (and the burden

to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay * * * resulting * * * from riots or strikes."

It will be observed that no attempt is made to exempt the carrier from liability from strikes or riots in the case of negligence. This clause was approved by the Commission in the original Bill of Lading case wherein it recommended the so-called uniform bill of lading now generally in use (14 I. C. C. 346, 353). No change therein was proposed by the shippers in the subsequent proceedings by the Commission. (See appendix A to the opinion of the Commission, 52 I. C. C. 705, wherein shippers' and carriers' proposals are set out in parallel columns). The right of the carriers thus to exempt themselves from loss due to strikes and riots except in case of negligence was thus conceded by shippers' representatives before the Commission. Such right was not denied or even questioned by the Commission. On the contrary it approved the clause in question as lawful and reasonable in the preceding case and has approved its retention in the inland portion of the export bill of lading in the present case. (Section 1 of the Commission's export bill, transcript p. 84).

It is evident on the face of the report that the

Commission's action was based solely upon the view that exemption from liability for loss or damage due to strikes and riots, while valid at common law, was prohibited by the Cummins amendments. The Commission rightly construed the Cummins amendments as inapplicable to traffic to non-adjacent foreign countries and held that in considering the inland portion of export bills of lading issued on shipments handled under through bills of lading from interior points to non-adjacent foreign countries it was not bound by the provisions of that act. (Opinion pp. 726-729). Its action in striking the provision out of the domestic bill of lading and allowing it to stand in the inland portion of the export bill of lading can therefore be explained only upon the theory that the Commission was governed solely by its interpretation of the Cummins amendment. Under the export bill the inland carrier is relieved altogether from any loss or damage occurring after the property is delivered to the ocean carrier and the inland provisions of the bill reviewed by the Commission apply only to the liability of the inland carrier itself. There is therefore nothing which distinguishes the relation of the inland carrier to the export freight and its relation to domestic freight except the difference which is made by the applicability of the Cummins amendments to the latter and not to the

former. Any provision just and reasonable as to the one form of traffic is just and reasonable as to the other. Any provision unjust or unreasonable as to one of these two classes of traffic would likewise be unjust and unreasonable as to the other. The Commission does not expressly state the ground upon which it requires the elimination of this clause in the domestic bill. All there is in the opinion on this most important subject is embraced in the following paragraph:

> "Although the matter is not brought in issue, we are not satisfied with the carriers' claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for 'delay caused by riots or strikes', as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable."

While this paragraph standing alone might warrant the inference that the clause is condemned as being in itself unjust and unreasonable the Commission's action in authorizing its retention in the inland portion of the domestic bill, coupled with the distinction which it draws between the operation of the Cummins amendment upon the two classes of traffic involved, makes it clear that the Commission's action is predicated wholly

upon the view that the provision is not "in accord with the law." It is equally clear that the law to which the Commission refers is the Cummins amendment and not the common law with which it is concededly in accord and the Commission's action was error.

Retention of the strikes and riots clause is of the utmost importance.

A discussion of the practical importance of the clause seems also appropriate. Strikes, especially those of large proportions, are frequently, if not generally, accompanied by violence and destruction of property, while it would be an infrequent and unusual case in which a riot would not be attended by such destruction. In the Debs strike 1000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. (U. S. *vs.* Debs, 64 Fed. 724, at p. 728). Railroad property and the contents of railroad cars are peculiarly subject to attack in times of strikes and riots, even when the rioting has no direct connection with railroad operation. The clause is particularly important during the reconstruction, post-war period. The conditions which were dealt with effectively by the courts in the case of In Re Debs (158 U. S. 564) were railroad and local to Chicago but are today nation-wide and are general industrial disturbances, such as the steel strike and the bitu-

minous coal strike. The coal strike has been apty characterized by competent governmental authority as a conspiracy in violation of the Lever Act and in disregard of existing agreements as to wages and working conditions. Violence and the consequent destruction of property by the familiar methods of marching coal miners, etc. have so far been held in check, but may develop at any time from such a dispute. Railroad cars and their lading could not escape. The losses which will follow ought not to be laid on the railroad alone. The clause is not only a matter of simply justice to the carriers under the circumstances, but is of great practical importance.

Shipper has option to secure full common law liability.

By paying the higher rate a shipper may secure the carriage of his goods at common law liability. It is but just and reasonable to permit the railroad company to exempt itself from liability from this cause in consideration of the lower rate charged. This the Commission recognizes in continuing the clause in the export bill. Furthermore to make the railroad company responsible in all cases for destruction or damage due to strikes and riots is an invitation to the lawless to destroy such property at the railroad's expense, particularly in that class of riots which are incited by misguided men with revolutionary

ideas working, through methods like sabotage, for a definite purpose.

C. The Commission erred in relieving the Consignor (contrary to law) of payment of freight money if, contrary to instructions, the carrier makes delivery without collecting.

(*Assignment of Error VI* (c).)

At the hearings the carriers were conditionally willing to consent to this provision in order to secure assent of the shippers to other conditions for which they contended. But these other conditions were denied to the carriers.

Liability of the consignor to pay freight is beyond dispute. One at whose request a service is rendered must pay: Elgin *vs.* U. S., 253 Fed. 907 (C. C. A.) at page 911. The carrier's right to collect is absolute and arises out of the relationship as guarded and enforced by the tariff provisions of the Commerce Act, and is not referable to the Commission's will or within the administrative field of "reasonableness."

FIFTH POINT

The injunction was not broader than the relief prayed. The Commission's order was not severable and was rightly enjoined as a whole.

The motions to dismiss were properly overruled.

(*Assignment of Errors V, VII, X and XI.*)

The District Court Jurisdiction Act (38 Stat. at L. 219, 22 October, 1913) authorizes an injunction suspending "in whole or in part, any order made or entered by the Interstate Commerce Commission." The Bills ordered by the Commission are entire contracts of interrelated covenants. An injunction should not be granted to restrain the Commission's order (even if the Commission has power to prescribe the contract) in regard to certain of the covenants only—the water line clauses for instance,—because that would be altering the Commission's contract, and thus an exercise of the Commission's administrative function by the court.

From this angle the case at bar is like the Nashville Terminal Case (242 U. S. 60) where this Court directed an injunction to issue against the whole of an order of the Commission though in part the order was not illegal.

The case at bar, in respect of the bill and injunction order, conforms to those which had the

approval of the courts in the Tank Car Case (242 U. S. 208). And as to the breadth of the prayer as compared with the injunction we are content to point out that the bill was filed by Railroad Companies and Water Lines, (all served with the Commission's order) on behalf of themselves and all other similarly situated carriers, and the relief by injunction was of the same scope.

As to the right of the parties plaintiff to immediate injunctive relief the District Court stated the controlling considerations thus (Tr., p. 112):

> "It is said that the petitioners, except the five water carriers above mentioned, are unaffected by the order because now in the actual control of the Director General of Railways. This control is expected to cease within the current year, and they will be subject to the order the moment their properties are returned to them whether the Director General complies with the order or not. If it was right to subject them presently to the order it is right that they should be allowed presently to dispute it, and we think there can be no doubt that the water carriers who can only escape from the order by withdrawing from joint arrangements with the land carriers and making entirely new dispositions and all the carriers who will be bound by it when their properties are returned to them will be subjected to damage irreparable within the meaning of the law."

LAST POINT.

It is respectfully submitted that the order of the District Court granting the injunction should be affirmed with costs.

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Of Counsel.

DECEMBER, 1919.

No. 541.

OCTOBER TERM, 1919.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

ALASKA STEAMSHIP COMPANY ET ALS., Appellees.

APPENDIX TO BRIEF FOR CARRIERS (APPELLEES).

SHOWING CHANGES MADE IN THE CARRIERS' BILL OF LADING BY THE ORDER OF THE COMMISSION.

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DECEMBER, 1919.